Petition

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81-2069

NO.

IN THE

Supreme Court of the United States

October Term, 1981

ASSOCIATED GROCERS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TRANSPORT AND LOCAL DELIVERY DRIVERS, LOCAL NO. 104,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ASSOCIATED GROCERS,
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NATIONAL LABOR RELATIONS BOARD,
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TRANSPORT AND LOCAL DELIVERY DRIVERS,
LOCAL NO. 104,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Associated Grocers, respectfully petitions for a writ of certiorari to review the order of the Court of Appeals for the District of Columbia Circuit entered in this case on December 1, 1981.

OPINION BELOW

The summary order, without opinion, of the Court of Appeals (App. A-1) granting enforcement of the decision of the National Labor Relations Board is not reported. The Decision and Order of the National Labor Relations Board is reported at 253 NLRB 31 (1980) (App. A-3–A-15).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 1, 1981. A timely petition for rehearing was denied on February 9, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

QUESTION PRESENTED

Whether an employer violated § 8(a)(3) of the National Labor Relations Act by replacing strikers during an economic strike with workers he intends to be permanent, and then denying reinstatement to those returning strikers who have been so replaced.

STATUTE INVOLVED

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158 (1976), provides in pertinent part as follows:

> 8 . . . .
>
> (a) It shall be an unfair labor practice for an employer–
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

STATEMENT OF THE CASE

This action was initiated by a complaint before the National Relations Board ("NLRB") issued by the Regional Director and prosecuted by the General Counsel, charging Associated Grocers (the "Company") with certain unfair labor practices, and alleging that these practices converted an economic strike into an unfair labor practice strike, thus imposing upon the Company the duty to reinstate all returning strikers regardless of whether they had been permanently replaced by other employees.[1]

The Administrative Law Judge (ALJ) found that the Company had committed no unfair labor practices and that the strike therefore was an economic one for its duration (App. A-78). An employer is not required to reinstate returning strikers following an economic strike if they have *permanently* been replaced, although temporary replacements must be "bumped" in favor of returning strikers. The ALJ therefore considered whether the striker-replacements hired by the Company during the strike had been permanent. Concluding that they were, he held that the Company had not violated the National Labor Relations Act ("NLRA" or the "Act") by refusing to reinstate strikers who had been replaced.

The General Counsel appealed to the Board. The Board too found that the strike had not been converted into an unfair labor practice strike (App. A-10). However, despite its purported acceptance of the facts as found by the ALJ (App. A-4), the Board reversed the ALJ's holding that all of the striker-replacements were permanent (App. A-5). Rather, the Board concluded that some of the striker-replacements were temporary and that the Company's failure to reinstate those strikers whose positions had been filled by these "temporary" replacements violated § 8(a)(3) of the Act.

The Company petitioned for review in the Court of Appeals[2] and the Board cross-petitioned for enforcement. The

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[1] Originally three separate complaints were filed alleging different unfair labor practices. The three complaints were subsequently consolidated into a single complaint.

[2] Associated Grocers' Petition for Review was originally filed in the Court of Appeals for the Ninth Circuit. However, on the same day that

Court of Appeals for the District of Columbia Circuit entered an order enforcing the Board's order and denying the petition for review.

This petition for a writ of certiorari followed.

The strike which gave rise to this case was unusually violent. The record is rife with accounts of physical attacks, beatings and threats upon the lives of management, upon workers who did not participate in the strike, upon replacement workers, and upon their families (App. A-30-A-38). The strike was also accompanied by widespread destruction of property belonging to the Company and its non-striking employees (*Id.*).

The strike began on April 12, 1978 and ended almost six months later, on October 4, 1978 (App. A-5, A-10, 11). During that time, the Company hired over 1,000 striker-replacements (App. A-5).

Until May 10, 1978, all striker-replacements were hired on a temporary basis. On that date, however, after hiring well over 200 striker-replacements, the Company president, B. J. Nichols, determined that all striker-replacements, both those previously hired and those to be hired in the future, would be permanent employees (App. A-5, A-39, 40).

From May 10 on, Company policy as determined by the president was that striker-replacements were *permanent* employees of the Company. As the ALJ found: "as of May 10 Respondent's policy with respect to the hiring of striker-replacements was to treat them as permanent employees except to the extent that they failed to complete the probationary period" (App. A-40). After that date, all striker-replacements were treated as permanent employees. Each striker-replacement was placed on probation (temporary employees are not placed on probation because there is nothing probationary about temporary jobs). All striker-replacements were eligible for pay on legal holidays. They were covered by the Company's medical plan. They were accruing vacation and sick leave. As

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petition was filed, the union filed a Petition for Partial Review in the District of Columbia Circuit, and the Ninth Circuit thereupon transferred the Company's Petition to the District of Columbia Circuit by order dated February 27, 1981.

the Company's personnel manager testified, the striker-replacements were treated "no different" than the strikers with regard to terms and conditions of employment (Tr. 742).[3]

In addition, Associated Grocers consistently and repeatedly represented to the union that the striker-replacements were permanent, and thus would not be bumped in favor of the returning strikers (App. A-26, 51). The union leadership relayed this information to the union members (App. A-26), who found numerous unsavory ways to convey their displeasure to the striker-replacements.

When the strike ended, the Company conscientiously attempted to find positions for the returning strikers; however, it refused to bump striker-replacements, because, in the Company's good faith view, the law did not require the Company to reinstate strikers whose positions had been filled. The returning strikers were, however, promptly placed in such positions as were then vacant and were recalled to work in order of seniority as additional vacancies arose (App. A-48-49, 57, 60, 62, 77).

At the hearing on the complaint, the General Counsel's principal contention on this aspect of the case was that Company acts during the strike had converted it from an economic strike into an unfair labor practice strike. A finding that the strike was an unfair labor practice strike would have required the company to bump striker-replacements with returning strikers even if the striker-replacements had been permanent. The General Counsel did not seriously argue that the striker-replacements were temporary rather than permanent because, as he said, "it doesn't matter" (Tr. 755; quoted in ALJ Decision, App. A-64).

Both the ALJ and the Board found that the strike was an economic strike, not an unfair labor practice strike. As a result of that determination, it did matter whether the striker-replacements were temporary or permanent.

The ALJ found that all striker-replacements were permanent (App. A-40). Although it purportedly accepted the facts

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[3] The parenthetical notation "Tr." refers to the transcript of the proceedings before the ALJ. Numbers appearing after these notations refer to page numbers.

as found by the ALJ (App. A-4), the Board nevertheless reversed the ALJ's finding that all striker-replacements were permanent. Instead, the Board ruled that striker-replacements hired after May 10, 1978 were temporary (App. A-6). The Board based this conclusion on the fact that the striker-replacements hired after May 10, 1978 continued to sign a document acknowledging that they were being hired on a temporary basis (*Id.*). Such a form had routinely been used prior to that time (App. A-5) and, therefore, when President Nichols changed Company policy with respect to striker-replacements on May 10, 1978, a letter was sent to striker-replacements already hired informing them that they were thereafter to be regarded as permanent employees (*Id.*). As a result of what the Board itself described as "a communications failure" (App. A-5), subordinate management employees continued to use this "temporary form" when hiring striker-replacements after the May 10 letter was sent (*Id.*). Since this form was used only as a result of a communications failure, no subsequent letter was ever sent to these employees to inform them that they were being hired as permanent employees (*Id.*). The Board seized on this fact to hold that the post-May 10 striker-replacements were temporary and that, therefore, returning strikers were entitled to bump them. The Company's failure to permit returning strikers to bump these post-May 10 striker-replacements, said the Board, constituted a violation of § 8(a)(3) of the Act (App. A-6).

In reaching this conclusion, the Board applied a requirement that there exist a "mutual" understanding and commitment between the employer and the replacement employees on the permanent nature of the employment to support a finding of permanency (App. A-6). In this case, said the Board, the striker-replacements hired after May 10 were permanent "only in the mind of Respondent's president" (*Id.*).

The Board ordered respondent to reinstate all strikers who wished to return and to bump replacement employees as necessary. The Court of Appeals affirmed without opinion.

Reasons for Granting the Writ

This case presents important, unresolved questions of labor law relating to the rules for determining permanency of striker-replacements in an economic strike.

According to the Board (and the court below), permanency of employment of striker-replacements requires a mutual agreement regarding the permanent nature of the employment. Associated Grocers argues, on the other hand, that permanency may be established by a unilateral determination by the employer, because permanency is essentially the conferral of a benefit, which does not require an employee agreement. A determination of permanency on this basis is wholly consistent with the purposes of the Act.

Here there is no question that management, through the president of the Company, conscientiously, unequivocally and in good faith, determined that all striker-replacements were permanent. The Board accepted this obviously correct factual finding. It reversed the Administrative Law Judge's determination of permanency only because the Board required, in addition to the employer's determination, an agreement on the part of the employee.

A.

Although, as a general rule, an employer is required to reinstate striking employees upon their unconditional offer to return to work, the employer is entitled to refuse to reinstate economic strikers if there are "legitimate and substantial business justifications" for the refusal. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The law is clear that the employment of permanent replacements for the striking employees is such a justification. *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). Moreover, courts will not inquire into the reason why a company makes a decision permanently to replace striking employees. *See Mackay Radio & Telegraph Co.* v. *N.L.R.B.*, 304 U.S. 333 (1938); *Hot Shoppes, Inc.*, 146 NLRB 802 (1964). An employer has a right to replace strikers permanently, in its business discretion. *Mackay Radio and Telegraph Co.* v. *N.L.R.B., supra.*

When an economic strike ends, the employer has no obligation to bump permanent striker-replacements with returning strikers. Although the rule is different in the case of an unfair labor practice strike, all tribunals below agreed that in this case the strike was an economic one, *not* an unfair labor practice strike.

The requirement of the law that an employer must reinstate striking employees upon their unconditional offer to return to work is imposed on the employer (absent countervailing considerations) so that employees will not be discouraged from exercising their right to strike. *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. at 378; *International Association of Machinists District No. 8* v. *J. L. Clark Co.*, 471 F.2d 694, 696 (7th Cir. 1972). The striking employee takes a risk, however, that the employer will permanently replace him with another employee. *Lodges 743 and 1746, International Association of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 445 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). This is the balance struck by the Act.

Whether a striker-replacement actually agrees with the employer that he is a permanent employee or whether his status is determined by management policy is irrelevant to the interests protected by the Act. Clearly, an employer may permanently replace strikers and refuse to bump replacements with returning strikers and may do so without regard to its reasons. Accordingly, the test of whether an employer has exercised that right should be whether it has in fact hired permanent replacements as determined by company policy. Requiring an agreement of the striker-replacement that he is permanent to accord him that status would not further the policies of the Act. Therefore, the application of such a rule is not warranted. *See N.L.R.B.* v. *Big Three Gas and Equipment Co.*, 405 F.2d 1140, 1143 (5th Cir. 1969), *quoting, Iowa Beef Purchasers, Inc.* v. *N.L.R.B.*, 331 F.2d 176, 185 (8th Cir. 1964). *See also Hot Shoppes, Inc.*, 146 NLRB at 804 (finding that the employer intended the striker-replacements to be permanent and holding that they were therefore permanent).

B.

The ultimate question in this case is whether Associated Grocers violated § 8(a)(3) of the Act. A § 8(a)(3) violation, however, requires an affirmative showing that an employer has the intent to act for a proscribed purpose. *See N.L.R.B.* v. *Fleetwood Trailers, Inc.*, 389 U.S. 375 (1967); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34.

As this Court said in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311 (1965), "Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise." *See also N.L.R.B.* v. *Southern Plasma Corp.*, 626 F.2d 1287 (5th Cir. 1980), *op. modified and reh'g denied*, 633 F.2d 1210 (1981); *N.L.R.B.* v. *Fort Vancouver Plywood Company*, 604 F.2d 596, 600 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *W. W. Grainger, Inc.* v. *N.L.R.B.*, 582 F.2d 1118 (7th Cir. 1978); *Edgewood Nursing Center, Inc.* v. *N.L.R.B.*, 581 F.2d 363, 368 (3d Cir. 1978).

Speaking specifically of the hiring of permanent striker-replacements, this Court has stated:

> The employer's permanent replacement of strikers, his unilateral imposition of terms, or his simple refusal to make a concession which would terminate a strike – all impose economic disadvantage during a bargaining conflict, but none is necessarily a violation of § 8(a)(3).
>
> To find a violation of § 8(a)(3), then, the Board must find that the employer acted for a proscribed purpose.

American Ship Building Co. v. *N.L.R.B.*, 380 U.S. 300, 313 (1965).[4]

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[4] In this respect a § 8(a)(3) violation differs from a § 8(a)(1) violation which does not depend on wrongful purpose or motivation. *See N.L.R.B.* v. *Southern Plasma Corp.*, 626 F. 2d at 1293. Section 8(a)(1) [29 U.S.C. § 158 (1976)] states:

> (a) It shall be an unfair labor practice for an employer–
>
> (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

The Board expressly stated in this case that: [W]e find that Respondent violated Section 8(a)(3) by refusing to reinstate economic strikers. . . ." (App. A-4). Later, in passing, the Board also cited § 8(a)(1) (App. A-6). Although there is a tendency to use § 8(a)(1) as a catch-all for all unfair labor practices and to subsume under the general rubric of § 8(a)(1) those practices specifically described in § 8(a)(3), § 8(a)(3) must be considered independently of § 8(a)(1). Otherwise, § 8(a)(3) would be unnecessary and the requirement of showing a discriminatory purpose under § 8(a)(3) would be meaningless.

Here the employer refused to reinstate the strikers in the good faith belief that it had permanently replaced them. A large majority of the strikers who wished to return to work were promptly taken back and placed in positions that were then vacant; thereafter, additional strikers were permitted to return as additional vacancies arose, and striking workers were recalled based on seniority (App. A-48-49, 57, 60, 62, 77). The Company refused, however, to bump striker-replacements in the good faith belief that they had been hired on a permanent basis. This good faith belief was justified by the fact that Company policy had determined these striker-replacements to be permanent; the Company had treated them as permanent; and the union had been notified that they would not be bumped. Since there was clearly no improper motivation on the part of the Company, there can be no violation of § 8(a)(3).

C.

A number of cases have dealt with the question of whether striker-replacements were permanent or not, but the judicial guidelines are vague and uncertain – and should be clarified by this Court. For example, in *H & F Binch Co.* v. *N.L.R.B.*, 456 F.2d 357, 362 (2d Cir. 1972), the Court held that an enforceable agreement between the striker-replacements and the employer was *not* required as a prerequisite to a finding that a permanent replacement had been hired. The court stated that:

> Since such hires are almost always oral and at will, it is not necessary that conversations should have taken a form where the "replacements" would have a cause of action if a striker was allowed to return to work before the replacement arrived on the scene.

In *N.L.R.B.* v. *Murray Products, Inc.*, 584 F.2d 934, 939 (9th Cir. 1978), the court indicated that the intent of an employer to effect a change in policy so as to make new hires permanent would be sufficient to make them permanent if there is an objective manifestation of that intent.

The Board looked to the intent of the employer in determining that striker-replacements were permanent in *Hot*

Shoppes, Inc., 146 NLRB 802 (1964). There, the employers intent was manifested by the fact that the employer treated the replacements in accordance with its usual hiring practices.[8]

Other cases, on the other hand, have leaned toward requiring a *commitment to permanency* on the part of the striker-replacement. *See N.L.R.B.* v. *Mars Sales & Equipment Co.*, 626 F.2d 567 (7th Cir. 1980). Sometimes the court simply throws up its hands and says the issue of permanency is one of fact. *See N.L.R.B.* v. *W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977), *enforced*, 617 F.2d 349 (1980).

The truth is that although the question of whether a striker-replacement is permanent is a recurring one, no court has squarely faced the critical issue presented by this case; namely, whether permanency of employment of striker-replacements may be conferred unilaterally by management or whether, on the other hand, permanency requires an agreement on the part of the striker replacements, as well as a determination of company policy. This is a troubling issue which arises in hundreds of economic strikes every year. Moreover, the many decided cases have left the law in a state of embarrassing confusion. The issue deserves the attention of this Court.

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[8] The Court of Appeals in the instant action cited no authority whatever, and the Board's decision relied not on the cases cited above, but on *Covington Furniture*, 212 NLRB 214 (1974). That decision, however, was not based on whether the striker-replacements had an agreement with the employer; moreover, it is clear from the opinion that the decision was founded upon the employer's lack of credibility. Indeed, the General Counsel's brief in support of the Board's decision in the court below did not even cite *Covington Furniture*, apparently in recognition that it was inapposite. In addition to *Covington Furniture*, the Board's decision cited *Superior National Bank and Trust*, 246 NLRB 721 (1979), preceded by the introductory signal "cf.," in obvious recognition that this was a weak reed on which to rely.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Appendix

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2358

TRANSPORT AND LOCAL DELIVERY DRIVERS, LOCAL 104,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 81-1289

ASSOCIATED GROCERS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
& TRANSPORT AND LOCAL DELIVERY DRIVERS, LOCAL 104,
Intervenor

September Term, 1981

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 1 1981

GEORGE A. FISHER
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: MacKINNON, ROBB and EDWARDS, Circuit Judges

ORDER

These petitions for review came on to be heard on the administrative record from the National Labor Relations Board, and were briefed and argued by counsel.

On consideration thereof, it is

ORDERED and ADJUDGED that the petitions for review are hereby denied. It is further

ORDERED and ADJUDGED that the National Labor Relations Board's cross-application for enforcement is hereby granted.

Per Curiam
For the Court

/s/ George A. Fisher

George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

FJP

253 NLRB No. 5

D–7096
Phoenix and Tempe, AZ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASSOCIATED GROCERS

and

Cases 28–CA–4911,
28–CA–5091, and
28–CA–5153

TRANSPORT AND LOCAL DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 104, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 20, 1979, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge only to the extent consistent herewith.

As more fully set forth by the Administrative Law Judge, the principal issue is whether Respondent violated the Act when, in response to substantial strike misconduct, it required returning strikers to take a polygraph examination and, if so, whether that conduct prolonged the strike, thereby converting it to an unfair labor practice strike. If not, there are still questions whether Respondent violated the Act by failing to reinstate strikers properly at the conclusion of the strike, or by failing to meet its bargaining obligation thereafter. The General Counsel has excepted to the Administrative Law Judge's dismissal of the entire complaint.

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent did not engage in surface bargaining. However, contrary to the Administrative Law Judge, we find for reasons set forth below that not all the strike replacements were permanent, and that Respondent violated Section 8(a)(5) of the Act by unilaterally establishing the unit position and wage rate for cashiers. Also, contrary to the Administrative Law Judge, we find that Respondent violated Section 8(a)(3) by refusing to reinstate economic strikers and by requiring strikers to either incriminate themselves and others for, or prove their innocence of, both strike-related and non-strike-related misconduct, as a condition of reinstatement.

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[1] Respondent has requested oral argument. The request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In agreeing with the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(5) of the Act by unilaterally changing the probation period from 60 to 90 days, we rely only on his findings that the charge was barred by Sec. 10(b).

Nonetheless, we agree with the Administrative Law Judge's conclusion that the economic strike was never converted to an unfair labor practice strike because there is no evidence that Respondent's violations of the Act, discussed below, prolonged the strike.

1. The Facts as found by the Administrative Law Judge do not support his conclusion that as of May 10, 1978,[4] all strike replacements were hired as permanent employees. The more than 1,000 replacements hired during the April 12 to October 4 strike signed a statement acknowledging that their employment was temporary. On May 10 all then current employees received a letter from Respondent's president, Nichols, advising them that they had been hired as permanent employees entitled to company benefits after a 90-day probationary period. Between May 10 and May 18, 237 employees signed an acknowledgement at the bottom of the letter. However, because of a communication failure between Nichols and his personnel managers, replacements hired after May 10 received and signed only the original statement acknowledging temporary status.

As regards replacements hired on or before May 10, the Administrative Law Judge concluded that Nichols "intended to clarify, or at least convert, all replacements to permanent status," a finding with which we agree. In finding that all strike replacements hired after May 10 were permanent, the Administrative Law Judge reasoned that President Nichols' May 10 letter carried more weight than the hiring slips solicited by the personnel office, and concluded that "as of May 10 Respondent's policy with respect to the hiring of strike replacements was to treat them as permanent employees except to the extent that they failed to complete the probationary period." For reasons set forth below, we disagree.

Permanent replacement of strikers in order to continue business operations is a legitimate business justification for refusing to reinstate economic strikers upon appropriate application. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1939). However, it is an affirmative defense and Respondent has the burden of proof. *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *W.C. McQuaide, Inc.*, 237 NLRB

[4] All dates are in 1978 unless otherwise indicated.

177 (1978); *National Fresh Fruit and Vegetable Company and Quality Banana Co., Inc.*, 227 NLRB 2014 (1977), enforcement denied on other grounds 565 F.2d 1331 (5th Cir. 1978). Here, the burden was satisfied only with respect to the 237 employees who signed the May 10 letter acknowledging permanency. Each of those 237 employees and Respondent had a mutual understanding and commitment on the permanent nature of their employment. Conversely, replacements hired after May 10 acknowledged that their employment was temporary and received no assurance that their employment was permanent. The permanency of the post May 10 replacements was established only in the mind of Respondent's president, a showing insufficient to satisfy Respondent's burden. *Covington Furniture*, 212 NLRB 214, 219–220 (1974); cf. *Superior National Bank and Trust*, 246 NLRB No. 123 (1979).

The Union made appropriate application on behalf of the strikers in its October 4 mailgram to Respondent, unconditionally offering to return to work. Respondent refused to take back all of the strikers immediately since it maintained that all replacements were permanent. Economic strikers must be reinstated upon appropriate application, absent a legitimate business justification which can include permanent replacement. *Mackay Radio*, 304 U.S. 333. As the Administrative Law Judge found that the strikers had been permanently replaced, he found Respondent's refusal to immediately reinstate strikers justified. However, as set forth above, we do not agree that all strike replacements were permanent. Thus, by refusing to reinstate on and after October 4 those economic strikers who had not been permanently replaced, Respondent violated Section 8 (a)(3) and (1) of the Act.

2. The Administrative Law Judge concluded, in agreement with Respondent, that the magnitude of strike violence and misconduct here justified Respondent's use of a polygraph. However, this business justification crumbles when all the relevant facts are considered.

Substantial misconduct had occurred early on in the strike. Respondent produced business records, kept for insurance purposes, that show that between April 12 and June 5 there were 64 incidents involving property damage, 33 involving harassment, and 14 involving assaults, batteries, or other risks to

people. Relying on these records to show its state of mind, that it feared that a striker might return to work and vandalize the Company from within, Respondent claims that its June 5 institution of a polygraph test, as part of a standardized procedure for reinstating strikers, was justified. That procedure required that the callers be routed to Cooksey, the vice president in charge of operations, or to specified individuals during Cooksey's brief absences. If callers did not express a desire to return, they were given a brushoff. If the caller expressed a desire to return, then three questions were asked: (1) Are you abandoning the strike? (2) Are you offering to come back unconditionally? (3) Will you abide by the result of a polygraph test? A test was scheduled for everyone who answered affirmatively to all three questions, others were told nothing was available.

The polygraph examination reports reflect that once a striker submitted to the polygraph examination, his involvement in strike misconduct was greatly diminished in importance. Thus, of the approximately 40 questions asked in the polygraph examination, only a few had any connection to the strike. Rather, strikers were questioned, *inter alia*, about whether they ever engaged in a work slowdown, falsification of industrial accident claims, suspicions about co-workers' involvement in nonstrike-related company misconduct, and theft of company property.

Respondent in effect conditioned a striker's reinstatement on a response to any type of question, and in some cases requested signed "confessions." These incriminating questions regarding the employment relationship went far beyond the realm of strike misconduct, yet only strikers were required to answer them. Respondent has offered no justification for imposing these wide ranging questions only on strikers. We conclude that Respondent penalized strikers for their support of the strike, by requiring as a condition of reinstatement that they take a polygraph test to prove their innocence of both strike-related and nonstrike-related misconduct, in violation of Section 8(a)(3) and (1) of the Act.

3. The Administrative Law Judge dismissed the General Counsel's allegation that Respondent unlawfully removed the position of "cashier" from the cash-and-carry bargaining unit

without bargaining, finding that Respondent had no obligation to bargain about the cashiers since they were supervisory or managerial employees. Moreover, the Administrative Law Judge noted that removing nonunit employees from the cashiering function created unit positions and found that Respondent had offered to bargain over these new positions, but that the Union had not pursued the matter.

The General Counsel excepts and contends that cashiering had always been performed by unit employees, and that Respondent's presentation of a new "cashier" job description and any offer to bargain was after the change had been affected. We find merit in the General Counsel's exception although we need not decide whether cashiering was removed from the bargaining unit. Rather, we find that Respondent violated Section 8(a)(5) and (1) by unilaterally establishing, and setting a wage rate for, the bargaining unit's cashier position.[5] Thus, the cash-and-carry contract covered all employees except managers, and had job descriptions for "regular employees," "casual employees," "truckdrivers," and "working foremen," but not for "cashiers." Further, union negotiator Lock testified that while Respondent's job description for "cashier" paralleled what unit employees actually had done, it was not offered until after the change had been effected. In this regard Lock testified that at the last negotiating session on November 11 he first learned that a new job classification of "cashier" was currently being performed by recently hired employees at a wage rate lower than any specified in the contract.[6]

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[5] In finding a violation, Member Penello notes that the cashier position was created before the filing of a decertification petition in the cash-and-carry unit.

[6] In agreement with the Administrative Law Judge, Chairman Fanning finds that division cashiering was historically performed by managerial employees. Cash-and-carry manager Pachello unequivocally testified that managers were relieved of cashiering duties when "cashiers" were added to the cash-and-carry operation. He also agrees that Respondent gave the Union ample opportunity to bargain over the new position. The record establishes that bargaining bogged down and no sessions were held from June 1 to September 28. Further, Lock admitted that historically most of the warehouse unit contract was incorporated into the cash-and-carry contract at the conclusion of negotiations, and that the first formal discussion of the cash-and-carry proposals was held on November 1. (cont.)

4. We find that the Union knew of the elimination of produce packagers' jobs by June 1, 1978. The Administrative Law Judge concluded that Saunders, Respondent's chief negotiator, "probably" informed Union Representative Lock at the June 1 bargaining session that the produce packagers' jobs were being eliminated. In fact, Saunders testified that at the June 1 session he had told Lock that employees whose jobs were being eliminated, like those of the produce packagers, could not return to work. Further, Lock did admit that on June 1 Saunders informed him that some jobs were being eliminated from the unit. Hence, the December 1978 charge is barred by the 6-month statute of limitations in Section 610(b) of the Act. Accordingly, on this basis we agree with the Administrative Law Judge's dismissal of this aspect of the complaint.

5. We agree with the Administrative Law Judge's conclusion that Respondent did not violate Section 8(a)(5) when it resumed administering industrial vehicle tests in January 1979, a preexisting practice disrupted by the strike. We also agree that the record does not sustain the General Counsel's allegation that Respondent conditioned its contract settlement upon the Union's acquiescence to the removal of certain warehouse work from the unit. Union representative Lock testified that he learned in October 1978 from Saunders that new clerk positions were created. Although the Company claimed, contrary to the Union, that these positions were outside the bargaining unit, it furnished the Union with job descriptions and the positions were the subject of negotiations. Thus, as the Administrative Law Judge found, Respondent gave the Union full opportunity to bargain over the topic. In adopting these conclusions we find it unnecessary to rely on the Administrative Law Judge's alternative analysis that Respondent had no obligation to bargain at that time.

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[6] Thus, Respondent made a bona fide offer to bargain about the cashier position in November in due course of the negotiations, but the Union chose to file a charge instead of dismissal of this allegation, Chairman Fanning finds it unnecessary to rely on the Administrative Law Judge's alternative finding that Respondent had no obligation to bargain at the time.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally establishing a position and wage rate of cashiers on or before November 14, 1978, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By requiring strikers as a condition of reinstatement during the strike, to take a polygraph test to prove their innocence of both strike-related and nonstrike-related misconduct, and by refusing to reinstate economic strikers who were not permanently replaced on October 4, 1978, the date of their unconditional offer to return to work, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The economic strike which commenced on April 12, 1978, was not prolonged or converted to an unfair labor practice strike by virtue of the aforesaid unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not engaged in all other unfair labor practices alleged in the complaint.

The Remedy

As Respondent has been found to have engaged in unfair labor practices, we shall recommend that it take specific action, as set forth below, designed to effectuate the policies of the Act.

Having found that Respondent refused to reinstate on and after October 4 those economic strikers who had not been permanently replaced, we will order that Respondent immediately reinstate all employees who struck and have not been permanently replaced to their former jobs or substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and that it make whole such

employees for any loss of earnings resulting from its failure to reinstate them since October 4, computed in accordance with the formula stated in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and with interest in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Those employees for whom no employment is available shall be placed on a preferential hiring list for employment as positions become available, and before other persons are hired for such work. Priority for placement on such list is to be determined by seniority or some other nondiscriminatory test. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Having found that Respondent discriminated against strikers by requiring as a condition of reinstatement during a strike that they take a polygraph test to prove their innocence of both strike-related and nonstrike-related misconduct, we shall order Respondent to cease and desist from such practices and to make employees whole for any losses they may have suffered as a result of such unlawful conduct.

Having found that Respondent unilaterally established the bargaining unit position and the wage rate for cashiers, we shall order Respondent to cease and desist from unilaterally establishing bargaining unit jobs and wage rates.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Associated Grocers, Phoenix, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally establishing wages and positions in the bargaining unit.

(b) Refusing to accord strikers who were not permanently replaced as of October 4, 1978, reinstatement rights to which they are entitled as economic strikers.

(c) Discriminating against strikers by requiring, as a condition of reinstatement during a strike, that they take a polygraph test to prove their innocence of both strike-related and nonstrike-related midconduct.

(d)In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Bargain upon request about the bargaining unit position and wage rate for cashiers.

(b)Reinstate strikers who have not been permanently replaced to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make such employees whole for any loss of earnings resulting from its failure to reinstate them since October 4, 1978, with interest computed in the manner set forth in the "Remedy" section of this Decision. Employees for whom no employment is available shall be placed on a preferential hiring list, based upon seniority or some other nondiscriminatory test, for employment as positions become available and before other persons are hired for such work.

(c)Make employees whole, with interest, for any loss of pay suffered as a result of the discriminatory polygraph tests.

(d)Preserve and, upon request, make available to Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e)Post at its warehouse and cash-and-carry facilities in Phoenix and Tempe, Arizona, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous

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[9]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. October 14, 1980

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

> To engage in self-organization
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
> To refrain from the exercise of any of all such activities.

WE WILL NOT unilaterally establish wages and positions in the bargaining unit.

WE WILL NOT refuse to accord strikers who were not permanently replaced as of October 4, 1978, reinstatement rights to which they are entitled as economic strikers.

WE WILL NOT discriminate against strikers by requiring them, as a condition of reinstatement during a strike, to take a polygraph test to prove their innocence of both strike-related and nonstrike-related misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by section 7 of the National Labor Relations Act.

WE WILL bargain upon request about the bargaining unit position and wage rate for cashiers.

WE WILL reinstate strikers who have not been permanently replaced to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make such employees whole for any loss of earnings resulting from our discrimination against them, plus interest. WE WILL place employees for whom no employment is available on a preferential hiring list, based upon seniority or some other nondiscriminatory test, for employment as jobs become available.

WE WILL make whole, with interest, employees who have suffered a loss of pay as a result of the discriminatory polygraph tests.

ASSOCIATED GROCERS
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3030 North Central Avenue, 2d Floor, P.O. Box 33069, Phoenix, AZ 85067, Telephone 602–241–2362.

JD-(SF)-305-79
Phoenix, Ariz.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

ASSOCIATED GROCERS

and

Case Nos. 28-CA-4911
28-CA-5091
28-CA-5153

TRANSPORT AND LOCAL DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 104, an affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Kenneth D. Meadows and Denise M. Blommel, Phoenix, Ariz., for the General Counsel.
Michael J. Keenan of *Ward & Keenan, Ltd.*, Phoenix, Ariz., for the Charging Party.
Jerome L. Froimson and Guy David Knoller of *Froimson & Knoller, Ltd.*, Phoenix, Ariz., for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me at Phoenix, Arizona, on 12 hearing days between March 19 and April 15, 1979, pursuant to three

complaints issued by the Regional Director for the National Labor Relations Board for Region 28, ultimately consolidated on February 7, 1979, and which are based upon charges filed by Transport and Local Delivery Drivers, Warehousemen and Helpers, Local Union No. 104, an affiliate of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union) on June 20, October 27 and December 19, 1978[1] respectively. The complaints as amended allege that Associated Grocers (herein called Respondent) has engaged in certain violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act (herein called the Act).

Issues

The principal issue is whether or not Respondent violated the Act when in response to a violent strike it required, during the course of the strike, returnees to submit to a lie detector test. If so, did that conduct prolong the strike and thereby convert it from an economic to an unfair labor practice strike? If not, did Respondent violate the Act by failing, at the end of the strike, to properly reinstate strikers; and did it thereafter fail to meet a bargaining obligation independent of any previous conduct?

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Excellent briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent. The Union filed a statement adopting as its own the position taken by the General Counsel.

Upon the entire record[2] of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business

Respondent admits it is an Arizona corporation engaged in the wholesale grocery business and having its headquarters

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[1] All dates herein refer to 1978 unless otherwise indicated.

[2] The General Counsel's unopposed motion to correct the record is granted. Other errors occurred as well. When pertinent I shall note them.

in Phoenix. It further admits that during the past year, in the course and conduct of its business it has purchased and received goods and materials valued in excess of $50,000 from suppliers outside Arizona. Accordingly it admits, and I find, it to be an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, the Union to be a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Participants and Relevant Bargaining Chronology*

Respondent is a large wholesale grocer operating a warehouse in Phoenix which employs over 400 people. At that facility it receives and distributes groceries, meats and other items to its grocery store customers, most of whom are members of the AG cooperative. It also operates four so-called "cash and carry" outlets in the Phoenix area. These are smaller warehouse operations to which customers may come with their own trucks and purchase products for resale. One is located within the main warehouse facility, two are elsewhere in Phoenix and the fourth is in Tempe.

The Union has represented a large number of Respondent's warehouse work force since about 1950. In general the job classifications covered by its past collective-bargaining contracts include warehousemen, freezer room men, warehouse laborers, truckdrivers, repackmen, truck servicemen and mechanics, working foremen, leadmen and fresh produce packagers. It did not include janitors and pallet repair employees, nor the maintenance mechanics, all of whom are tangentially involved in this dispute. Also, not included in the warehouse bargaining unit were certain business office employees and, apparently, meat cutters. The Union did, however, represent, in a much smaller, separate bargaining unit, employees of the cash-and-carry facilities, recently less than 10. In addition, the Union represented drivers located at Respondent's Baird's Bakery Division.

Besides representing a large number of Respondent's employees, the Union also represents the warehouse employees of several other grocery chains in the Phoenix area. These include El Rancho (Arden-Mayfair); Safeway Stores, Inc.; A. J. Bayless Markets, Inc.; Fry's Food Stores; Alfred M. Lewis, Inc.; S. E. Rykoff and Co. and Continental P. M. Foods. The collective-bargaining agreements which the Union had with all of these employers expired on March 1, 1978, though the Union had earlier sent its reopener notice to Respondent on December 15, 1977 and apparently to the others as well.

Respondent and most of the others retained Arizona Employers Council as their professional negotiator, specifically utilizing the services of the Council's Ed Saunders. Their use of a single negotiator, however, should not be construed as multiemployer bargaining, although each observed the other's negotiations with the Union. The Union's principal negotiators were assistant business agent Anthony "Tony" Lock and its secretary-treasurer Horace Manning.

On January 4 the Union sent Respondent its first proposal covering the warehouse agreement. Following their past practice, the cash-and-carry contract was set aside to be dealt with after the warehouse agreement was settled. At approximately the same time, the Union demanded recognition in a separate unit of janitors and pallet repairmen as well as a group of maintenance mechanics. At the meeting of January 9 Respondent granted recognition to the Union with respect to the janitors and pallet makers. Respondent declined to recognize it in the maintenance mechanics unit as it contended the refrigeration specialists should also be included. Respondent offered to recognize the Union as the representative of that slightly larger group as soon as the Union could demonstrate its majority status—the Union appears to have been short by one authorization card.

On January 27 negotiations over the warehouse contract commenced. In addition to Respondent's group, consisting of Saunders, AG's vice president in charge of operations William Cooksey and its executive vice president in charge of dry grocery operations Don King, representatives of the other grocery chains also attended. Their presence caused some consternation among the Union's bargaining committee as the Union did

not wish to engage in multiemployer bargaining. Saunders took the position that the representatives of the other firms were there only as observers. The Union, not then wishing to disrupt bargaining, made no objection and began discussing the 31 proposals submitted on January 4 as well as a 32nd proposal. As the General Counsel has stipulated, that Respondent engaged in no bad-faith bargaining until May 17, there is no point in detailing all that happened during the 10 meetings preceding May 17 except to the extent that some matters have relevance to the issues raised in the complaints.

At the January 27 meeting, typical of first meetings, the parties went through each of the proposals and Saunders admitted to being "generally disagreeable" but made no specific counterproposals.[3] During that meeting one of the Union's proposals was to prohibit Respondent from requiring employees or applicants for employment to take a polygraph test. By way of background on that topic, it should be observed that Respondent had begun polygraphing applicants for employment in April 1977 as well as polygraphing individuals who were being promoted from hourly to salaried or supervisory status. There is also testimony that Respondent, to investigate malfeasance, had polygraphed current employees on a "request" basis occasionally during 1977. The General Counsel disputes that testimony, but only in vague terms; indeed the testimony of Respondent is nearly as vague. With respect to the topic, Saunders asserted that the Union had no right to bargain on behalf of applicants for employment; the Union voiced no disagreement with that proposition.

Another proposal related to a wage demand for the produce packagers (i.e., potato baggers). Lock concedes that the Union's proposal would have more than doubled the seven potato baggers' pay. He recalls Saunders asking why the Union wanted such a high rate when that would simply put Respondent out of the produce packing business and put those employees-

[3] No doubt typical "opening day bombast," a phrase used by the Board in *Romo Paper Products Corp.*, 220 NLRB 519 at 524, to describe a common first day tactic which is usually discountable in terms of evaluating the totality of bargaining.

out of work. Lock replied their rate had caused a lot of difficulty as they worked in such close proximity to people earning higher rates, since they were part-time and did not have the same fringe benefits as the full-time employees and because it was a constant source of irritation.

On February 6, following a meeting regarding the maintenance mechanics, the parties again discussed the main warehouse agreement. As Respondent had invited observers from the other firms, the Union refused to continue the meeting. Each side accused the other of engaging in a refusal to bargain and each filed appropriate charges with the Board's Regional Office. Between that date and March 29, no meetings occurred relating to the warehouse contract although the parties did discuss and bargain over the maintenance mechanics, the janitors, the pallet repair employees and the drivers' seniority rules. Agreement in principal was reaehed on the drivers' seniority rules, although they were subject to later modification. On March 23 the parties met again, the Union's charge against Respondent having been dismissed and a complaint having been authorized against the Union for refusing to meet with Respondent and its observers. With respect to the March 23 meeting, Lock testified that in the process of "paring down" its proposals, the Union agreed it had no right to negotiate on behalf of employment applicants and therefore dropped its demand with respect to polygraphing them. He recalls "the Company" saying that it would not force an employee to take the polygraph, but wanted the right to keep it available upon request. They agreed it had not been a problem in the past. Except for the date, Lock's testimony here is consistent with that of Respondent's witnesses Saunders, King, Cooksey and A. J. Bayless' James Naber. They testified that the only time polygraphs were mentioned during bargaining was on January 27. It may simply be that either Lock or Respondent's group is mistaken with respect to the date the Union's concession on the point occurred.

On March 29 Respondent made its counterproposals and further meetings were held on April 4, 5 and 6-7, the last being a marathon bargaining session in an attempt to reach an agreement before the Union's strike deadline.

As a result of the marathon session of April 6-7, Respondents and the other companies formulated what came to be

known as the April 7 proposal. The Union's officials took that proposal to their membership on April 9 but it was rejected. Between April 9 and April 12, no meetings were conducted though some inconsequential informal conversations between Saunders and the union officials occurred.

On April 10 Respondent issued a memo to its employees regarding the rights of strikers. Two of the topics discussed in the letter are pertinent here. First, in one paragraph entitled "Who May Work?" Respondent advised that if employees who were union members wished to work instead of strike they were free to do so, but

> . . . the union members should turn in their union cards first. This is necessary because members of the union have agreed to abide by union decisions. The U. S. Supreme Court in 1974 upheld fines to $6,000 imposed by the IBEW on hourly and salaried members who crossed picket lines to work at Florida Power & Light. In order for a union member to come to work without being subject to a union fine, he or she should turn in the union card prior to coming to work. Members may do this by mailing the card registered, return receipt requested, to the union hall.

Second, under the heading "Seniority-Is It Affected?" Respondent stated that employees who work during the strike will continue to accrue seniority but "Strikers will not accrue seniority during the strike. However, they will not lose the seniority they acquired prior to the walkout." In addition, the letter described the right of an employer under the law to replace economic strikers in order to continue operating its business.

Although a number of the employees testified they did not see the letter, it is clear that many did. Most likely those who say they never saw the memo simply failed to read it for it was distributed to them with their paychecks.

On April 12 the strike began at three of the firms involved, Respondent, Alfred M. Lewis and Safeway. Of Respondent's approximately 400 warehouse and cash-and-carry employees, nearly all struck; the parties stipulated that 36 did not. In addition, it appears that unrepresented employees also remained at work. In response to the strike, Respondent began hiring replacement employees.

The Union struck A. J. Bayless and El Rancho on April 14 while on April 19 it obtained a settlement from Fry's Food Stores which had not been struck.

On May 5 the first bargaining session after the strike began was conducted. During that meeting Saunders spoke on behalf of all the companies present and made a settlement proposal for all except Respondent saying Respondent had several areas requiring further discussion. Another meeting was held on May 10 under the auspices of the Federal Mediation and Conciliation Service. At that meeting Respondent continued to offer the April 7 proposal with respect to noneconomic matters and the April 7 proposal insofar as economics were concerned but without the retroactivity offered by the other firms. On March 23 the parties had extended the agreement until economic activity was taken. Also on May 10 Respondent advised it did not intend to pay the May health and welfare premiums because the employees were not at work; however, Saunders did agree to check with the Trust regarding Respondent's obligations. He also said the maintenance of benefits dates needed to be changed to June 1. Another meeting was held on May 15 at the FMCS office. Lock described it as a rehash of the May 10 meeting. He remembers Saunders saying there might be trouble on the back-to-work provisions for Associated Grocers.

On May 17 a third FMCS meeting was held. Representatives of all the other companies were present. Saunders, speaking on behalf of all the employers, continued to insist upon the April 7 proposal. It appears that the Union was continuing to insist, as it had in previous meetings, that an additional 10 cents per hour be added to the first year wage package (it was willing to move the effective date by several months). In addition, the Union demanded that all the strikers be returned to work immediately upon ratification of the agreement. According to Saunders, Lock said that the strike would continue unless the 10 cents was added to the proposal. Saunders recalls union negotiator Bill Grami (a Western Conference of Teamsters representative who had recently joined the Union's bargaining team) "subtly"* suggesting that the strike would be extended to the California operations of Lewis and Safeway if the dime was

* Saunders was being sarcastic.

not added. Saunders recalls telling Grami that perhaps the Union could shut down those companies on the Coast but it would make no difference to Respondent or A. J. Bayless who were Arizona companies.

All five companies continued to maintain their April 7 posture. There were some slight modifications: moving the effective date of the dental changes, accepting the retiree health and welfare plan, and agreeing to pay the May health and welfare if the employees ratified the agreement and returned in May. The only difference between Respondent's contract proposal and that of the other four firms was that Respondent refused to pay retroactive wages during the extended contract, asserting retroactivity had been conditioned upon settlement of a contract without a strike. As that condition had not been met, Respondent would not make those payments. AG also said it would not pay the May health and welfare premiums.

With respect to the back-to-work issues El Rancho, Safeway and A. J. Bayless agreed to take all strikers back; Lewis agreed to do so as well, except for four named employees who had been accused of shooting trucks on the highway. When Grami learned of Lewis' opposition to their recall he again threatened to shut that firm down in California and Nevada.

Respondent's back-to-work position was significantly different from that taken by the other firms. Both Saunders and Lock testified in detail respecting this topic. They agreed Respondent's position was: (1) Striking employees had been replaced and the replacements would remain if they were performing their duties properly. (2) Returning strikers would be required to go through the normal process of reapplication and would be returned by seniority groups as needed; they may or may not be accepted, but if rehired they would retain their seniority. (3) When a returning striker was recalled he would be assigned a job and shift within his seniority group and within 4 months of the strike's settlement Respondent would institute a rebid permitting returned strikers to bid for their old jobs. (If a striker had not yet been recalled he would not be eligible to participate in the rebid.) These procedures, according to Company estimates, meant that approximately half of the work force would be able to return within 30 days after contract ratification.

At this point there is a dispute between Lock and Saunders regarding further clarification of these proposals. Lock testified he asked Saunders if returning strikers had to go through the reapplication procedure whether they would be required to take polygraph and physical examinations. He says after consulting with King and Cooksey Saunders replied, "It's part of the rehiring procedure." Lock says he then told Saunders the Union would recommend rejection of Respondent's proposal to its membership because there was "no guarantee that anybody would go back to work."

Contrary to Lock, Saunders testified that although he was ready to answer questions relating to polygraph[1] and physical examinations, neither Lock nor any union official raised the question about what "hiring procedures" meant and the polygraph was not discussed at all. His testimony here is corroborated by King, Cooksey, and A. J. Bayless' Naber. Lock's notes, while reflecting in detail the specific back-to-work proposals, are silent regarding any clarification; there is no mention of either physical or polygraph examinations.

After listening to the proposal of all five firms, Lock advised they would present the Bayless proposal to its membership without a recommendation and would present the Lewis, El Rancho, Safeway and Associated Grocers proposals with a recommendation to reject.

On May 18 the Union held a membership meeting of Respondent's employees at the Plumbers Hall in Phoenix. It was conducted principally by Lock, although Manning and other Local officials, together with Crami and other Western Conference officials, were also present. Lock testified he explained Respondent's proposal to the effect that the economic offer

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[1] Saunders and the AG group, aware of the Union's earlier proposal relating to polygraph examinations and aware that the Union knew Repondent had been polygraphing new hires since early 1977, had prepared a response to any questions regarding that topic if it came. Saunders and the other three management officials who testified say no union official asked about it. However, the proposed answer, never actually articulated, was to the effect that Respondent wanted to polygraph returnees only about violence toward company property or employees, false claims of sick leave and industrial accidents and theft of company property. If an employee failed the test he would not be rehired.

was the same as before but without retroactivity; there was a change in health and welfare date; the cost-of-living adjuster was included and the noneconomic proposal was the same. Regarding the back-to-work proposal, he explained there was no guarantee that employees would return and for that reason was recommending the offer be rejected. He told them only half would be eligible to return within 30 days and even then not to their old jobs. He explained the rebid after 4 months, saying employees would have to call in and because they were being treated as new hires they would be required to take the polygraph and physical examinations. The membership rejected Respondent's proposal by a vote of 338 to 5.

One of Lock's official duties was to serve as recording secretary. However, since he was engaged in describing the contract proposals, he was unable to perform that duty and it was assigned to Richard E. Coleman. Coleman's minutes, which are in reasonably good detail, do not reflect that Lock said anything about polygraph or physical examinations, although they do accurately reflect the remainder of Respondent's proposal. Coleman was not called as a witness and Lock explains the omission as probably one of simple oversight.

Twelve employees said they attended the meeting; it appears from their testimony that it was confused, loud and disordered. When they were asked what Lock told them at the meeting their answers varied. Nine of the twelve said the most significant thing which occurred was the nearly unanimous response opposing the Company's proposal to take back only a percentage (recalled as anywhere from between 10 and 50 percent) of the strikers. One thought that was a minor portion of the meeting and a third left before the vote. Four of the twelve recalled the polygraph being mentioned and a fifth recalled that both polygraph and physical exams were mentioned; six were silent on that topic, two were either equivocal or vague on the subject and one, Neil Little, recalls the topic in the context that Respondent was requiring strikers to return as new employees and believes Lock "assumed" polygraphs and physicals would be required because that was the known procedure for new hires.

After analyzing all the circumstances relating to the May 17-18 discussion of polygraphing, I have come to the

conclusion that Saunders' version, as corroborated by Cooksey, King and Naber, is the more probable. Moreover, I was particularly impressed with employee Neal Little's recollection of what occurred at the union meeting. He made a strong and careful effort to recall exactly what occurred and when he was asked what Lock had explained about the company proposal, he replied, "Well, it started like everybody would be a new employee and I don't know if it was assumed or was actually said that you had to take a polygraph and physical examination." When he was specifically asked what was said about the polygraph test, he replied,

> Well, you know that's always been a mystery. I don't know if everybody assumed that if you start as a new employee that that's what you had to do and it was stated, if you go back as a new employee, so everybody assumed or – Tony [Lock] assumed that that was the way it was going to be or not. I don't know that.

I think it is fair to say from his recollection, which appeared to be more accurate than most of the others (at least two thought Manning was the speaker), that the topic of polygraphing was discussed but Lock confused it with Respondent's actual proposal. Lock was aware that new employees were required to take polygraph and physical examinations and he was aware also that Respondent had said employees would go through a reapplication procedure. I believe and find that Lock engrafted the polygraph and physical examination to Respondent's proposal as he attempted to explain it to the membership. It was for that reason that the acting recording secretary did not write it down for it was part of Lock's explanation, but not part of Respondent's actual proposal. I must reject Lock's testimony that he sought and received during the May 17 meeting an explanation for the "reapplication procedure." He simply assumed he knew what it was. I therefore conclude that during the May 17 bargaining meeting the topics of polygraph and physical examinations were not discussed.[4]

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[4] It will serve no purpose to analyze the proposal Saunders was prepared to make at that time had the question been raised. Such a discussion would be speculative at best.

B. *Polygraphing Returnees Begins and Bargaining Continues*

On May 18 and 19, four strikers applied to return to work. At this point strike-related violence was under way, though it had not yet reached the level it did later that month. The first was David Vaughn on May 18. He was separately followed by Virgil Lewis, Herb Snyder, and Charles Mercer on May 19. Vaughn, Lewis, and Snyder were asked by Cooksey to take a polygraph test and all three agreed to do so. Mercer was not. All four were promptly recalled to work. Cooksey explained that of the three who were polygraphed, two, Vaughn and Lewis, had worked in the frozen food department where large amounts of inventory had been lost under suspicious circumstances. According to Irving von Gnechten, Respondent's vice president and comptroller, the February 1978 inventory for that department showed $28,650 worth of missing merchandise, including $16,000 in frozen crabmeat. That loss had promptly been reported to corporate president B. J. Nichols; thus both Vaughn and Lewis were asked questions about theft within that department. Lewis appears to have admitted a certain amount of theft but that admission did not defeat his reinstatement. Questions relating to strike violence appear to have been asked, but only in a vague way (e.g., "Will your rehire by AG be against their best interest in any way?").[7] Snyder, though not having worked in a department which had suffered theft, was nonetheless asked a series of questions generally relating to employee honesty. He was also asked whether Respondent's property, employees, suppliers, or customers had been injured due to the strike and if so whether he could identify the perpetrators.

On May 20 the Union reached an agreement with A. J. Bayless and shortly thereafter the strike against that firm ceased. That settlement was bottomed on the April 7 proposal.

On June 1 another collective-bargaining session was conducted, again under the auspices of the FMCS. While there may have been some face-to-face contacts at that meeting they were not of a substantive nature. The FMCS commissioner closeted

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[7] The polygrapher, Glen Whitside, testified that as of May 19 he had not prepared any form questions specifically relating to strike violence. Most of the questions he asked were from standardized forms utilized in his profession.

each group in separate rooms and carried proposals between them. Even so, there is no significant disagreement between Lock and Saunders regarding what occurred. Lock says Repondent made an addition to its back-to-work proposal and modified one which had been made earlier regarding recall procedure. The addition was that strikers who were guilty of misconduct would not be eligible to return and the change was that employees whose jobs had been eliminated would not be entitled to return,[8] leaving for resolution the question of whether or not they might be returned to another job. Lock also recalls Saunders saying that returning strikers would not be considered as new hires, although in the May 17 meeting Saunders had said the returning strikers would have to "reapply and go through the normal company procedures of reapplication." (Lock's testimony.)

Saunders testified that on June 1 the May 17 recall procedure remained Respondent's proposal except that those "connect to violence" would not be recalled and those whose jobs had been eliminated were not to be recalled. He says this specifically referred to the produce packagers and he advised Lock that Respondent had gone out of the potato-bagging business. Both Lock and Saunders agree the polygraph issue was not discussed. Saunders says Respondent's June 1 back-to-work proposal dropped the requirement that returning employees had to be put through the application procedure. Whatever vagueness that phrase held from May 17 was clarified here. It is clear, moreover, that Respondent never treated any striker as a new employee. They never filled out new application forms nor were they given physical exams;[9] both are required of new employees and were given to strike replacements.

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[8] The only jobs which were eliminated—although not until July—were those of the produce packagers. As will be seen, Lock testified he did not learn of their elimination until September or October. Saunders says he so told Lock on either May 17 or June 1. Thus Lock's testimony here is an admission that he knew from Saunders on June 1 that some jobs were being eliminated, although he doesn't say whose jobs they were. No doubt they belonged to the produce packagers. See Saunders' testimony below.

[9] As late as October 4 Lock was still under the impression that physical examinations were being given returnees; his back-to-work proposal of October 5 included dropping the Union's continuous demand that the practice be stopped.

C. *Strike Misconduct*

With respect to proving that the strike was punctuated by excessive violence and misconduct which increased in number and vehemence from the beginning of the strike on April 12 to near crescendo pitch in early June, Respondent called a number of witnesses who testified about specific incidents. In addition, it offered summaries of reports compiled by its security staff. These were offered to show Respondent's "state of mind" at the time it allegedly instituted its policy of requiring returning strikers to undergo a polygraph test. I shall deal with the incidents involving actual testimony first, although all of those incidents reappear in the summaries together with additional incidents about which testimony was not taken.

Beginning in April and lasting for approximately 4 to 6 weeks into late May the office windows of corporate president B. J. Nichols were struck by numerous missiles such as marbles, ballbearings, lead balls and even an unfired small firearm bullet. His office, which is located on the first floor of the business office building contains several plate glass windows. Physical evidence shows each of the panes has been struck by at least one and usually more such missile. The panes adjacent to Nichols' desk contain five such holes. One window, the furthest from his desk, was actually broken. The pelting of his office took place at night and no individuals have been specifically connected to these "shootings," if that is the proper phrase. If nothing else, it demonstrated to Nichols his vulnerability to a possible assassination attempt during the day. While I do not suggest that anyone was attempting such an act, nonetheless Nichols must have been in fear for his life. Indeed, he took extensive measures to protect himself.

On April 14 strike replacement James Crawford, the day after he had been hired, drove a semitrailer to a Fry's store to pick up some grocery carts. As he and his assistant returned to the truck they saw someone running from it. A few minutes later when the vehicle was set in motion, he discovered the trailer had been disconnected from the tractor as someone had pulled the pin.

On April 23 and 24 and again on May 5 frozen food and deli supervisor John Schoenman was pelted by marbles and/or

steel balls on five occasions as he left the warehouse for the parking lot. He said he saw the missiles coming too fast to be hand-thrown and that he could hear them whistle in the air. He believes they were propelled by a slingshot or other mechanical device. He also heard them crack against the metal parking cover.

On approximately April 24 (2 weeks after the strike began) sometime near midnight, Schoenman with two passengers was driving out the parking lot gate. A picket named Albert Leyba, according to Schoenman, threw himself into the side of Schoenman's car, then jumped up and smashed one of Schoenman's car windows with his picket sign. As Schoenman pulled through the gate to park, Leyba fell down screaming, "He did it! He ran over me! You hate me John, you've always hated me!" Other pickets claimed to have "seen the whole thing" and joined Leyba's complaint. However, city police who were present had also seen it, investigated, and Schoenman was not charged with any wrongdoing; indeed, it appears Leyba faked the whole incident and was simply harassing Schoenman, who had previously been Leyba's supervisor. Nonetheless, Leyba can reasonably be seen as an *agent provacateur* attempting to ignite a flammable situation.

On April 25, at approximately 6:15 p.m., Roy Merrill, Respondent's assistant manager of data processing, left work to go home. After leaving Respondent's facility he came to a nearby intersection where he was waiting for a stoplight readying himself for a left turn. Someone on foot came up behind him, accused him of working at AG as a scab and struck him through the driver's open window. Merrill was injured in the left eye and temple area. When Merrill attempted to get out of his car, the assailant returned, headlocking and then hitting him in the face five or six more times. Merrill staggered back to his car, pulled through the intersection and stopped. He was thereupon assisted by a paramedic unit which had seen the incident. He was taken to a hospital where he was treated, including five sutures in the left eye area, and released. Merrill was unable to identify his assailants but two individuals were arrested and tried. At the trial, however, the two defended on the grounds that someone else had done it. Indeed, in court another man admitted he was responsible. As a result, the two accused were exonerated.

In late April, one of Respondent's printers, Calvin Van Note, a non-unit employee and a nonstriker, left work in the evening. He went to a nearby cocktail lounge, the Niagara Bar, for a drink. At approximately 11 p.m. as he left the bar and went around the corner to his motorcycle he was grabbed by two men one of whom hit him saying, "We don't like somebody taking our job." Van Note protested that he was working at his own job and was not taking anyone else's but was hit twice more. When he straightened up the assailants were gone.

In addition to driving his motorcycle Van Note also owned a small sportscar without a top. On occasion pickets told him as he went through the main gate in the auto that he should be wearing a helmet as a rock or pop bottle or something could be thrown at him.

Strike replacement Larry Little was hired in late April and testified that approximately a week after he was hired he was leaving the warehouse at midnight. As he left the 27th Avenue gate he drove past the nearby parking area used by the pickets. He saw a white car pull out from that site and begin following him. A high speed chase through downtown Phoenix then began, reaching speeds of 100 miles per hour. Little testified the chase included running numerous stoplights, making 180 degree turns and being cut off by his pursuer as he attempted to drive to a police station. After some time he was able to escape and he reported the incident to the police.

During the same time period Little recalls seeing, one midnight at the 25th Avenue exit near the covered parking area, marbles being shot onto the driveway. He could hear them strike the metal roof approximately 100 yards from an area where pickets were congregating. He heard the marbles whistling in and pickets calling out, "Oh, you missed!"

Strike replacement Tom Escobedo testified that during May a number of incidents occurred. One evening, approximately May 1, all the windows in his new Thunderbird were broken while it was parked in the company lot. Later, as he drove out the gate, a picket asked him, "How's your window?" A few days later another vehicle, owned by his father-in-law and parked at Escobedo's home, was sabotaged by sugar being placed in the fuel tank. Approximately a week after that Escobedo's wife received an anonymous phone call which he

interpreted as a threat. Toward the end of May his camper was scratched by a picket as he exited the gate. Before the month ended, he saw, as he was again exiting the warehouse lot after work, a man from the pickets' campground throw a large rock at his camper seriously denting the cab. On June 1 another vehicle which he owned, a Chevrolet Nova, had its window mysteriously broken while it was parked in his front yard. In June his wife received another anonymous phone call which he also interpreted as a threat and he himself received two anonymous calls. In the first the caller told him he had no business working at Respondent, they had been working there a long time and had built the job up to good wages and if they ever caught Escobedo they were going to "break [his] f-----g legs." Also during the conversation he was warned to take care of his family and they would take care of theirs. Later that week he got the second call during which the caller told him that when Escobedo got off work they were going to "get him," that they knew what kind of vehicle he drove and they were going to get him when he drove out the parking lot and kick his ass.

Meatcutter Carlos Rodriguez, who had initially joined the strike but had returned to work on April 20, testified that 2 weeks after he returned someone spray painted the word "scab" on his car which was parked in the driveway of his home. He was fearful for his safety during the strike and usually rode to work with his immediate supervisor, Bob Warren, asserting he did so because there was "safety in numbers."

On May 3 after the shift was over, at approximately 1 or 2 a.m., supervisor Schoenman and his two riders were about to leave work in Schoenman's vehicle. One of the riders, Jim Pulatie, had gone on ahead to the car. When Schoenman arrived at the car less than a minute later, he discovered Pulatie lying in a pool of blood in great pain. Schoenman observed that Pulatie had a deep gash in the temple area of his left forehead. An ambulance was called. Pulatie, who then was still conscious, said he had been struck by a missile shot by "the bastards on the other side of the fence"—a reference to the strikers. Pulatie fell unconscious and was removed to a hospital by ambulance.

In early May strike replacement Joe Woods and a rider, a young man named Steven Thomas, had driven a truck to the

Tempe cash-and-carry outlet. That facility was being picketed and they had crossed the picket line to enter. After backing his truck up to the dock Woods began unloading it. Thomas, who was 19 years old, remained in the cab. While Woods was inside the trailer he heard a commotion in front. People were calling to Thomas saying, "Come out you f-----g scab and I'll shoot your brains out." Then Woods heard someone calling Thomas a "nigger" (both Woods and Thomas are black). The record is not clear how the incident ended. Woods was not asked what he saw when he got out of the trailer. He also says that he did not actually see a gun although Thomas told him one of the men had a pistol. A report was made to Respondent's security department.

Jim Reany is a cash-and-carry employee. His wife is AG vice president Cooksey's niece. Reany joined the strike at its inception and remained out for 2 or 3 weeks. After his return, approximately May 7, a Sunday night, he received an anonymous telephone call threatening to beat him up if he returned. On Monday, May 22, all the windows in his car were smashed as it was parked in front of his home. On May 30 at approximately 2:30 a.m. his two cars and his house were shotgunned while he and his family were sleeping.

Raymond Gomez, a clerical employee who had not struck, testified that at approximately 12:30 a.m. on May 9 while he was driving home he stopped at a railway crossing near the warehouse to wait for a freight train to pass. A van appeared behind him and bumped his vehicle toward the passing train. Either the bump was not severe enough to push him into the train or the driver did not intend to harm Gomez for Gomez was able to make a U-turn and avoid being shoved into it. I suspect it is the latter for the van blocked his retreat while the driver shouted, "Do you work with Associated Grocers? We have been seeing you over there and we are warning you, we want . . . you to cooperate with us."[10] Gomez replied he had no business with "you people," he worked in the office. They replied, "We know where you live and [if] you don't cooperate with us we are going to do something [to you]." Gomez is not totally facile in English, but the threatening tenor of his assailants' language and conduct is clear.

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[10] The quotation contains a transcript correction.

Also during the second week of May, according to Larry Little, his entry into the plant was blocked by a picket crossing the driveway who refused to move for 2 or 3 minutes until a security guard appeared and moved them on.

Sometime in mid-May, according to strike replacement Larry Graham, at approximately 11:30 p.m., as he was leaving the warehouse parking lot he was followed by a white Lincoln all the way to the Phoenix suburb of Glendale where he lived. He decided that rather than leading the driver of the Lincoln to his home he would try to lose him. A chase ensued and after he temporarily lost the Lincoln, it found him again at a stoplight. The driver of the Lincoln got out of his car and threw a brick at Graham's windshield. Seeing it coming, Graham managed to move his car so that the brick hit the door instead of the windshield. Angrily, Graham began chasing the Lincoln to get its license number. Finally after a 10-mile chase around Glendale, Graham attracted a policeman and reported the incident.

On May 23 one of Respondent's semitrailer trucks which had been parked behind a grocery store in Prescott was set afire in an incident which the police describe as arson. According to Prescott police detective James Moriarty, the truck had been parked at that location for approximately 10 days by its driver, a Prescott resident who apparently believed the lighted parking lot was a reasonably secure location. Moriarty testified that while investigating the fire he discovered the fuel line had been cut. He also found a length of string and burnt matches some distance from the vehicle. He determined the string was intended as a fuse which failed, and believes the fire was actually set by placing newspapers underneath the cut fuel line and setting them afire. Respondent's comptroller Irving von Gnechten testified that Respondent's insurer paid $16,434 for the loss of that tractor.

On about May 30 while Gomez and his family were sleeping in their house, someone began pounding on his doors, his cars and called him out. He called the police.

On May 30, as previously noted, Reany's house and cars were shotgunned. Also on that date, according to George Smail, a nonstriker who was a resident driver living in Kingman, he was driving south on Interstate 17 in Phoenix toward the warehouse. At approximately 2:10 a.m. as he neared the Grant

Street exit he heard sounds which he thought were backfires. He looked in his rearview mirror and saw a man leaning out of a vehicle with a shotgun. As he looked, the mirror was shot away. As another shot blew out Smail's front tire, he headed up the exit ramp. The assailant's car continued down the freeway. Smail was unable to identify the gunman. He nursed the truck to Respondent's warehouse where he advised the security department and the city police.

Also at the end of May, Larry Graham testified that he was again followed as he left the warehouse. He saw some pickets run to a Chevrolet Nova parked at their campground near the gate. Graham led them on a high-speed chase until he saw a policeman parked in front of a bar. He caused the policeman to arrest his pursuers.

Harvey Priem was employed as a security guard for the Malone Agency during the strike. One of his duties was to ride in trucks which delivered to the Smitty's grocery chain. During the early evening of June 2, just as it was getting dark, he was in a truck at Smitty's dock. Two gunshots were fired at the truck from a dark station wagon which was running without lights. It sped away at high speed. Priem was unable to obtain the license number or to recognize the driver.

Keith Strader, a security guard employed by a subsidiary of Respondent, Affiliated Systems, testified that he was assigned to patrol various locations at the main warehouse. Strader said as a security guard he wrote a number of incident reports, all of which involved violence or strike misconduct. He stated that between April 12 and June 5 he actually observed a number of incidents deserving report. He said there were nails in the driveway daily and on the first or second day of the strike he observed a picket break the windshield of a Bixby truck. Flat tires due to nails and "stars" were common.[11] Strader also recalls there was at least one bomb threat and on one occasion a lighted flare was thrown into a stack of pallets on the fence line causing a small fire. He commonly found ball bearings which had been

[11] A "star" is a device designed solely for tire sabotage. It consists of two sharp metal prongs welded together to form a four-pointed star. No matter how it is thrown it will always land on three of the four prongs with the fourth in a vertical position ready to pierce any tire which rolls over it.

shot upon the property. The ball bearings ranged from 1/2 inch in diameter to 3/4 and 1 inch. He also found lead balls and marbles near broken windshields. Once he found a .38 caliber bullet which had not been fired but which had been either thrown or slung upon the property. He remembers president Nichols' office windows were bombarded with marbles or ball bearings.

With respect to nails being thrown on the property, he remembers that one evening in June at the 25th Avenue gate it "snowed roofing nails." He said approximately 5 to 6 pounds of nails were swept up that day; it was not uncommon to pick up approximately 20 to 30 nails per 8-hour shift. Once while he was picking up nails a picket named Kirkpatrick tried to prevent him from doing so by attempting to step on his hands. In addition to nails and stars, he also saw plastic lids (apparently plastic sealer lids such as those commonly seen on coffee cans) with nails piercing them to guarantee that the nail would be in an upright position when run over. He also saw pickets scratch vehicles with their picket signs as they passed through the main gate. Finally he observed pickets commonly walking extremely slowly across the gates blocking ingress and egress to the plant.

Frank Wood, Respondent's vehicle maintenance supervisor, testified that after the strike began a large amount of tire damage to trucks came to his attention as well as damage to employees' cars. As part of his duties he reviewed the invoices for repair of those vehicles, both tire and labor costs. Most tire repair was contracted out and Respondent also decided to pay the repair costs for employee vehicles which appeared to have been victims of strike related damage. He says during the strike tire maintenance alone increased significantly, averaging $5,700 per month more than before the strike began. He also says that in late April he saw pickets throw nails and once observed pickets break a windshield of a non-AG truck at the gate.

All of the foregoing matters involve actual testimony at the hearing. In addition, however, Respondent detailed other incidents which were recorded by its security personnel as they came to their attention. The records were made on documents entitled "security report" and were kept in the regular course of the security department's business; it is clear that Respondent utilized these reports for several purposes. They were reviewed both by Respondent's president Nichols and its general counsel

Ross Blakely. Nichols reviewed them in order to assess the nature of the strike and the risks created by it. Blakely reviewed them for the purpose of determining whether or not there was sufficient evidence to seek an injunction against misconduct. The General Counsel has argued that little, if any, reliance should be placed on the reports as they are hearsay. As I observed during the hearing, however, Respondent has asserted that it did not institute the polygraph examination until June 5 and that it was instituted in response to the escalating violence of the strike. All of the evidence upon which it relied to determine that the strike was escalating is found in those reports. The reports show that between April 12 and June 5 there were 64 occurrences involving property damage, 33 involving harrassment of individuals and 14 involving unreasonable risk to persons such as assaults, batteries or what might appear to be attempted homicides.

One final observation should be made about the violence. While it appears that some of the alleged perpetrators of violent acts were identified and on occasion apprehended, for the most part the attacks were designed to conceal the perpetrators' identities. Most of the incidents occurred at night. Even where attacks, such as that against Merrill, occurred in the daylight, they were sudden and calculated to escape identification by the nature of the assault.[13]

In the face of the violence and the attendant confusion it is not surprising that Respondent attempted to do something to curtail it. Accordingly, president B. J. Nichols decided to polygraph returning strikers.

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[13] In Merrill's case two alleged assailants were arrested as a result of identification by the paramedics. It appears, however, that they were found not guilty because of the confession of a third individual. While the record is not clear with respect to the merits of the guilt or innocence of those three, nonetheless the availability of confusion tactics to the defendants punctuates the difficulties which Respondent faced. Even in circumstances where individuals were apprehended confessions by others may well have tended to confuse, rather than clarify those seeking the truth.

D. *Respondent's Conduct Toward Strike Replacements and Returning Strikers*

When the strike began on April 12, Respondent immediately began hiring strike replacements. As more than 300 individuals had struck, Respondent's personnel department was taxed to its limit to find replacements. Respondent had, a year earlier, begun polygraphing all applicants for employment. It also required physical examinations. Consistent with that policy, when the strike began, it gave all strike replacements both polygraph and physical examinations.

To fill the strikers' jobs Respondent advertised for replacements by radio and newspaper. While it is true that Nichols testified that he intended to hire each of these replacements on a permanent basis, nonetheless there is evidence to the contrary. For example more than 1,000 employees who were hired over the period of the strike (there was significant turnover among the strike replacements) signed a statement saying "I understand that being employed as a Casual (Jobber) does not guarantee that I will be considered for full-time employment." Furthermore, at some point replacements were placed on a 90-day probationary period rather than 60 days as had been the practice before the strike and they were told their jobs were temporary.

On May 10 virtually all of Respondent's employees received a letter from president Nichols advising the employee that when he or she was hired "it was as a full-time permanent employee, subject to the normal probationary period . . . ." Nichols also advised that at the end of the probationary period the strike replacement would be eligible to receive company fringe benefits under the company benefit program. The bottom of that letter consisted of a tear-away coupon which each employee signed acknowledging that he or she had received a copy of the May 10 letter and now understood that his or her job "is considered full-time, permanent employment. . . ." Two hundred thirty-seven employees signed that document between May 10 and May 18.

Nonetheless, it is also true that after the May 10 letter was issued and acknowledged, as replacements were hired Respondent continued to have them sign the first slip cited

above. Moreover, in a September unemployment compensation hearing before the Arizona Department of Economic Security, both operations manager Cooksey and personnel manager Jay Pickup testified that the strikers had not been [permanently] replaced and that the strike replacements were temporary hires. They explained their testimony there saying that was their belief at the time because they were unaware of Nichols' May 10 letter.

Frankly, in weighing this contrary evidence, and recognizing the improbability that either Pickup or Cooksey would be unaware of Nichols' May 10 letter, I nonetheless conclude that Nichols, on May 10 intended to clarify, or at least convert, all replacements to permanent status. While I am not able to discover the reason Pickup and Cooksey were unaware of that letter, Pickup's lack of awareness explains why he continued to have employee applicants sign the first slip thereafter. If Pickup was unaware of Nichols' decision to convert all the replacements to permanent status, it is only to be expected that he would continue to follow his first procedure. His adhering to that system after May 10 does not, therefore, lead me to conclude that it had any legal significance. Certainly president Nichols' letter, coming from Respondent's chief executive officer, must carry more weight in the overview than the hiring slips solicited by Pickup's personnel office. It seems fair to conclude that as of May 10 Respondent's policy with respect to the hiring of strike replacements was to treat them as permanent employees except to the extent that they failed to complete the probationary period.

Between May 22, when Lewis and Snyder returned (having been preceded by Vaughn and Mercer by 3 days) and June 6 no striker sought reinstatement. On June 5, according to Nichols, Cooksey, King and Randy Hendley, Respondent's grocery and general merchandise warehouse manager, a procedure for handling returning strikers was implemented. That procedure required routing each striker making an inquiry about returning to Cooksey (or in his absence to Hendley or King). The procedure, according to Nichols, as more fully described by Cooksey and Hendley, was first to find out what the caller wanted. If the caller did not express a desire to return, he or she was given a brush-off. If the caller expressed a desire to return he or she was asked three questions: 1. Are you abandoning the strike?

2. Are you offering to come back unconditionally? 3. Will you abide by the result of a polygraph test? If the caller answered negatively to any of the three, the company official told him nothing was available. If the caller replied affirmatively to all three, a polygraph test was scheduled. Upon passing it the returnee was assigned work in his or her former seniority district. Often the returning striker did not return to the same "primary job function" which he had held before, and often the shift and working hours were different. Cooksey explained that returning strikers were assigned jobs which were available in his or her seniority district as those were the most substantially equivalent jobs which could then be found. As the dispute progressed some of Respondent's older employees complained they were being assigned to jobs which they were unable to perform for they were too old or no longer strong enough to handle the jobs which were available. As a result of negotiations Respondent accommodated their needs by permitting them to pass until a job could be found which they could handle, at which time they were recalled to work.

Cooksey kept a detailed record, in evidence as GC Exhibit 3, of who called and when. The record shows the result of those conversations, although the entire conversation is not reflected on that document. Occasionally, when a particular caller would not follow the routine, Cooksey made separate notes about them.

It is significant that Cooksey did not begin keeping this record until June 5. That fact supports my earlier conclusion that the policy of polygraphing returning strikers was not actually implemented until that date, the earlier polygraphing of Vaughn, Lewis and Snyder notwithstanding.[13]

The General Counsel has alleged that during the course of these conversations, as well as during some conversations at or near picket lines, Cooksey or other management officials such as King or Nichols made statements to the effect that as a condition of returning to work strikers would have to abandon the Union and/or turn in their union membership

[13] Equally supportive of that conclusion is the fact that the polygrapher did not begin standardizing his examination questions regarding strike-related violence until after the May 18-19 polygraphing.

card. Frankly, I believe that matter can be handled nearly cursorily. First, it will be recalled that 2 days before the strike began Respondent issued a letter with paychecks which, *inter alia*, advised employees that if they failed to honor the strike while remaining members in good standing they could become subject to union fines.[14] Second, there is no question that Cooksey and his assistants followed the three-question format consistently. Third, some employees testified they understood the question "Are you abandoning the strike?" to be the same as "Are you abandoning the Union?" Fourth, a number of employees who agreed to the three conditions, knowing they would be crossing the picket line to return to work, asked Cooksey or Hendley what they should do with their union cards. On no occasion did Cooksey or Hendley advise them about union cards prior to the employee's question. Also, on each occasion when they were asked, they simply told the employee that to guarantee that the Union would not seek to fine them should they turn in their union card.[15] Even the employees who related the conversations

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[14] There is no claim that such a statement was violative of the Act.

[15] Ellery "Bud" Starr, a long-time employee who worked in the cash-and-carry unit, testified that he spoke to executive vice-president Don King several times in July while he and other strikers were picketing a cash-and-carry facility. He says King, with whom they were all friendly, walked over to the gate to talk; King says they called him over. Starr remembers King once saying, "Hey Bud, we'd like to have you guys back. I mean you guys are old AG employees. We'd like to have you come back. I don't know why you'd . . . give up all your seniority and all this and . . . just throw it away." Starr said King told them all they'd have to do to return was take the lie detector test and "turn in [our] union card, but turning in [the] union card wasn't really a 'must.'" (Starr's testimony.) Starr went on to explain that King's reference to the union card was not a condition of returning, just a way to avoid a union fine. With respect to King's alleged reference to their "throwing away seniority," Starr later conceded King may have urged them not to "throw away their jobs"; perhaps, offered Starr, King said both.

King testified the conversation began by Starr asking what they had to do to come back and he told Starr (and the others), they could come back tomorrow. Starr responded, "Yeah, but we'd have to take a polygraph, wouldn't we?" and King answered, "Why would you be concerned about something like that?" King denied saying employees had to turn in their union cards or abandon the union. The implication of his testimony is that seniority was not discussed. (continued)

in a manner which could be construed as undermining the Union's representative status readily admitted Cooksey and Hendley also told them that the choice was theirs; they could do with the Union card what they wished. The only reasonable conclusion to be drawn from the "choice" given these employees was that he or she could either keep the union card or not but that it would not affect their reinstatement. In the face of overwhelming evidence to this effect, I have rejected testimony of those few witnesses to the contrary.[14] Accordingly, I find there is insufficient evidence supporting the General Counsel's allegation that Respondent conditioned the return of strikers on their abandonment of union representation.

The General Counsel, in support of the argument that the polygraph test was coercive and prolonged the strike by inhibiting strikers from returning, points to certain notations made on Cooksey's call record as well as the testimony of some of the employees. Cooksey's records show that employees gave various responses to the three-question format. Some answered affirmatively to all three questions but failed to appear for the polygraph examination. In those cases Cooksey recorded that they were a "no show." Others refused to take the examination and Cooksey wrote "won't take poly." Other notes said, "won't cross picket line," "wants to think" and "talk with wife." The

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[13] Frankly, I do not believe the General Counsel has sustained his burden here with respect to Respondent's allegedly conditioning strikers' returning on abandoning union representation. Moreover, Starr's recollection regarding King's reference to seniority is too hazy to be relied upon, even though King did not specifically deny it.

[14] See, for example, the testimony of Robert Harry who impressed me as a very unreliable witness. He claimed to have telephoned Hendley in May and that Hendley told him to surrender his union card by registered mail, to make an appointment to take a lie-detector test which would involve questions regarding strike violence as well as other misconduct and who suggested that Harry would probably fail the test because he'd been arrested on a picket line for harassing people—calling them scabs. First, Harry admits Hendley asked him "something like" whether or not he was abandoning the strike. That would indicate the call occurred in June, not May as Harry insists. Second, Hendley says he never took a call until he was near his desk where he could make a record of it. There is no record that Harry ever called and Hendley denies he did. Third, Harry, in responding to questions in another area, strike misconduct, was terse and uncommunicative, appearing less than candid. His testimony is not credited.

General Counsel asserts that those who stated they would not take the polygraph and those who wanted "to think" were deterred from taking the polygraph because of its allegedly inherently destructive nature. Respondent concedes that some individuals refused to take the polygraph, but showed by direct evidence that many employees offered reasons other than the polygraph for refusing to take it and for deciding they wanted "to think." Indeed, it appears that some employees called Cooksey without having any intention of returning, even though they told Cooksey they did.

The witnesses testified as follows: 1. *John Hubble*. Hubble agreed to take the polygraph on June 5 but was a "no-show." He testified that a week after the strike began he told his supervisor, Bob Warren, that he didn't wish to return because the strike was so violent. He had no real complaint regarding the polygraph requirement; he had taken it when he was hired. Several weeks later (he says months) he spoke to Pickup who said he would have to take the polygraph as a condition of returning. Hubble agreed, but that day received an anonymous telephone call and the tires of his car were deflated. He became frightened and did not appear for his polygraph appointment. He later took the polygraph on August 3 and returned to work. 2. *Arnold Koch*. When Koch was originally hired in 1977 he had taken a polygraph test. After the strike began he called Respondent several times regarding returning to work. The records show that he called on June 8 and he said he would not take the polygraph. However, he testified that he spoke to Nichols on that occasion and told Nichols he would not cross the picket line. He says in July (the records show June 23) he called again and spoke to Cooksey. He agreed to the polygraph but Cooksey called him back and said that he had no openings. It was agreed that Cooksey would call him again when a job opened up. A week or two later Cooksey offered him a part-time job, but he refused it as he already had a full-time job. Shortly thereafter on August 16, Cooksey called again with a 40-hour job and Koch took it, returning on August 22.

3. *Rudy Castillo*. Castillo had been hired in May 1977 (and probably had taken a polygraph test at that time). He had been laid off 3 days before the strike, but joined it anyway. He called Cooksey on June 13 and answered affirmatively to all

three questions. However, he was a "no show" and did not appear for his polygraph appointment. He gave equivocal testimony regarding why he did not take the polygraph. To Respondent he said he simply decided to "stick with the Union"; to the General Counsel he said he decided not to go back because of the polygraph, his fear that the rules and regulations might be different, he didn't need it, and why go through more? To the Respondent he again admitted that he did not wish to abandon the Union. 4. *Celestino Rios.* On June 14 Rios called Cooksey to say he was considering crossing the picket line. Although he told Cooksey he was willing to abandon the strike he testified he also told Cooksey he was not willing to come back unconditionally. Cooksey's records show that Rios "won't take poly" but that appears to be an error. Rios did not make any other application until October when the Union called off the strike. He was finally recalled in January 1979.

5. *Harold J. Van Horn.* Van Horn is a long-time employee.[17] On June 16 he called Cooksey and after going through the three question routine[18] told Cooksey that if that was what he had to do, he would do it if he decided to come back. Cooksey's record shows Van Horn "wants to think." Van Horn returned to work on November 13 after the Union had called off the strike. He was never polygraphed as testing ended in October. 6. *James Veach.* Veach is a long-time employee. He called Cooksey on June 16 and asked what he had to do to get his job back. Cooksey asked him if he was willing to give up the strike. When Veach replied, "I didn't say that," Cooksey responded, "Well, there's no use going any further." Cooksey listed him as answering "no" to the first question, whether he was abandoning the strike. Veach admitted that when he called Cooksey in June he only wanted to find out what he had to do to get his job back and that he was fencing with Cooksey. He claimed he was merely checking out "the rumor" about the polygraph

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[17] He has been a working foreman for some time and may be a supervisor as he has the right to assign work. Even so, his job is in the bargaining unit.

[18] He says that Cooksey instead of asking him if he was abandoning the strike, told him to "turn in his union card." Van Horn is one of the individuals who appears to have confused the two phrases.

requirement.[19] Veach says he called Cooksey again in August saying he was willing to give up the strike and Cooksey offered him a polygraph appointment which Veach did not accept. Cooksey's record reflects no such call, but Veach's testimony regarding the second conversation is not significant in the overview. In some respects, however, Veach's testimony is subject to doubt. He was evasive and inconsistent. I doubt that the second conversation even occurred.[20]

7. *John Sirovatka.* Sirovatka telephoned Cooksey on June 21. Cooksey's notes show he was recorded as "want to think." Sirovatka testified he answered all three of Cooksey's questions affirmatively but then told Cooksey that because of the violence and because he feared people would follow him home, he wanted to protect his family and had decided to wait. He also admitted to me that he had not really made the decision to abandon the strike even though he told Cooksey that he would do so. Sirovatka did say the idea of being polygraphed bothered him "some" but his principal reason for not returning was his fear of violence. The General Counsel persuaded him to say that the polygraph was like being "on a tightrope" and then to say that the polygraph aspect was equal in weight to his fear of violence. Later, on August 31 he called Cooksey again and agreed to all the conditions; he took the polygraph and returned to work on September 4. Sirovatka had left the area during the course of the strike to seek work in another state. To do this he had obtained an honorable withdrawal card from the Union. He testified that since he had the withdrawal card it made him

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[19] Veach's characterization of the polygraph requirement as a "rumor", here occurring more than a month after the Union's membership meeting of May 18, buttresses my earlier conclusion that the polygraph was not actually part of Respondent's proposal on May 17.

[20] At first Veach claimed that during the May 18 Plumbers Hall union meeting he recalled voting on Respondent's proposal; then he said he did not remember such a vote, then said he did. Although he is a longtime union member he claimed not to know the meaning of the word "scab." He also said that although some of his friends returned to work during the course of the strike, they never actually told him of the polygraph requirement. To find him credible I must conclude he lives in a vacuum. Even his June call to Cooksey is suspicious. Since it was not a legitimate attempt to return to work and his claim that he was only investigating a "rumor" is hollow, it smacks of deviousness. Such a witness cannot be viewed except with doubt.

"feel more free" to go to work at Respondent. That implies, to a degree at least, that one of the reasons he did not return earlier was that he feared union discipline if he did so.

8. *Gene Hodges.* Hodges called Cooksey on June 21. Cooksey lists him as "wants to think." Hodges testified he answered the three questions affirmatively and when Cooksey offered to schedule him for the polygraph test he replied that he wanted to "think about it." He admitted before me that at the time he called he did not actually wish to return to work. He did not want to abandon the Union at that point and was also concerned about the violent nature of the strike. He called again on July 24, answered all three questions, took the polygraph and was promptly returned to work. In response to a question by the General Counsel he said he waited a month between July and August to see if the polygraph was "legal" and hoped it would be resolved. On reexamination by Respondent he reiterated that he decided not to return because he simply wanted to stick with the Union and that the polygraph did not really offend him. He also testified that he never told Cooksey in June that his decision "to think" had any relationship to the polygraph requirement.

9. *Robert Conroy.* Conroy did not impress me as a straightforward, candid witness. He was aggressive, pushy and had a tendency to characterize. He testified that in June, July or maybe August he called Cooksey. Cooksey's record shows that Conroy called on June 21. He says he has called at other times but the record is silent as to any other calls; nor did Cooksey recall any. Conroy claims that after he told Cooksey he wanted to return, Cooksey said the only way he could get rehired is if he came down, filed a new application and took polygraph and physical examinations. Conroy says he told Cooksey to go to hell. On two points alone Conroy is not believable. There is no evidence that after June 1 Respondent ever said anything about filing a new application (even before that the evidence is less than clear as to what was actually being required). Second, no returning striker was ever asked to take a physical examination nor was it ever proposed as a condition. It may be that assistant business agent Lock believed that to be the case, but it clearly was not. In that circumstance

it sounds as if Conroy is fabricating on the point.[21] Cooksey's record shows him as "talk with wife." Cooksey's testimony is that he went through the standard procedure with Conroy and Conroy agreed to all of the conditions but then said he wanted to talk to his wife. I observe that Conroy was a union steward and that connection to the Union may have caused him to color his testimony here. As with Veach, it does not appear that Conroy truly wished to return but was simply testing Cooksey.

10. *Joaquin "Ray" Candelaria.* Candelaria testified he called the Company twice and spoke to Hendley on each occasion. His first conversation was in late June. The record kept by Cooksey does not reflect this call. However, he says he asked Hendley if it was feasible to return to work and asked what the procedures were. Before Hendley could answer, Candelaria asked if his old job was still available. Hendley replied that it was and that he could come back to work after taking the polygraph examination. Candelaria testified he then told Hendley he would probably wait 2 or 3 weeks before he was sure if he wanted to return because he was worried about the violent nature of the strike. He also testified the polygraph requirement had nothing to do with his decision to wait. On July 17 he called again, took the polygraph test on July 21 and returned to work on July 24.

11. *Norman Pierson.* Pierson telephoned Hendley on July 18. After answering all three questions affirmatively, a polygraph examination was scheduled but he did not appear for it. Respondent's records reflect "changed his mind." Pierson testified that shortly after arranging to take the polygraph examination he got an anonymous telephone call which he regarded as threatening. The caller told him "You better think twice before you go across that line." As a result he decided not to return. On August 6, (Cooksey's records reflect August 10) he called again, this time speaking to Cooksey. Although his testimony with respect to the date of the polygraph test differs, from the record by about a week, it is clear that he took the polygraph test and was promptly returned to work.[22]

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[21] Conroy's testimony here is a carbon copy of what he says union secretary-treasurer Manning told the membership at the Plumbers Hall on May 18. He appears to have memorized that version. Moreover it was Lock, not Manning, who explained the proposal at the Plumbers Hall.

[22] Pierson is one of the individuals who believed the question about abandoning the strike was the same as abandoning the Union and severing his union membership.

12. *John Duhigg*. Duhigg telephoned on July 19 and spoke to Hendley. He told Hendley that he was strongly considering abandoning the strike and would return unconditionally and answered "maybe" to the lie detector test. Hendley's note lists him as a "no poly." However, before me Duhigg testified that he "wasn't sure if [he] was coming back." He says he also told Hendley he was unsure about returning because of the violence and felt he had to talk to his wife because he had strong union loyalties which he did not wish to give up. On August 21 he spoke to Cooksey. This time he answered all three questions affirmatively, took the polygraph the next day, coming in with a close friend because he believed that was the safe thing to do. He said he delayed his return to work because of the violence; he was aware of a car which had been shot up. He says he also told a Board attorney that he did not wish to return in July or August because of the violence. Finally, he testified that the polygraph requirement didn't bother him. 13. *Robert Hamilton*. Hamilton called Hendley on July 20. He answered all three questions affirmatively, took and passed the polygraph and was promptly returned to work. He expressed no concern with the polygraph requirement.

14. *William Eshenbaugh*. Eshenbaugh testified that he called Cooksey sometime during May, June or July. Cooksey's record shows it to be on August 10; Cooksey lists him as "wants to think." Eshenbaugh says Cooksey asked him if he was willing to give up the strike; Eshenbaugh says he answered yes and Cooksey told him he needed him to work nights. Eshenbaugh asked if he couldn't have his old job back and when Cooksey replied it wasn't available, Eshenbaugh said, "I'll have to think about it." It is clear here that Eshenbaugh's desire "to think" about the situation had nothing to do with the polygraph requirement. Moreover, Cooksey's testimony with respect to this conversation is far more cogent. He says that after Eshenbaugh said he was abandoning the strike, Cooksey asked him if he was offering to return to work unconditionally. He remembers Eshenbaugh asking him what an "unconditional offer to return" meant. It was then that Cooksey told him the only openings were on nights. Eshenbaugh replied that he would have to think about that. According to Cooksey the polygraph question was never reached due to Eshenbaugh's balk at the second question.

Eshenbaugh agrees that if he couldn't have his old job back he did not wish to return. As a result he took a job with Arizona Sand and Gravel. He has not contacted Respondent since.

E. *The Strike Winds Down; Later Negotiations*

As previously noted, the decertification petition was filed for the warehouse unit on June 9. On August 28 a similar petition was filed in the cash-and-carry unit. There is no contention that either petition was sponsored by Respondent or given any assistance by Respondent. The General Counsel contends, however, that the filing of the decertification petitions engendered bad-faith bargaining by Respondent. He has, however, stipulated that between the beginning of bargaining in January and at least May 17, Respondent engaged in good-faith bargaining. On that date he contends, due to the unilateral adoption of the polygraph requirement for returning strikers, Respondent violated Section 8(a)(5). (I have found, contrary to that contention, that the policy was not adopted until June 5.) Nonetheless, the General Counsel does not allege Respondent engaged in any bad faith, broad-based, refusal to bargain until after the decertification petitions were filed. No bargaining sessions were conducted between June 1 and September 28.

At the September 28 meeting, according to business agent Lock, the only issue remaining was "back to work." He says Saunders asked him if the Union's position had changed regarding Respondent's May 17 proposal. Lock replied that the Union would respond to each proposal on a step by step basis but wished to deal with the return of the strikers first; he wanted all strikers reinstated and then would negotiate the contract. Lock says he told Saunders the Union was willing to reestablish the expired contract for the interim period. Lock's position here suggests that "back to work" was not, as he testified, the only issue remaining. The Union may have been willing to capitulate to Respondent's contract offer, but if it was he did not say so, nor did he act as if it was. Even so, he appears to regard as insubstantial any remaining hurdles.

Saunders' testimony is somewhat different. He says Lock proposed that all strikers were to be returned to work upon ratification of the contract; there were to be no physical and no polygraph examinations but that the old contract would

be extended during the continued bargaining. He says Lock wanted individuals accused of misconduct to be handled separately. To those proposals he replied that the Company's earlier back-to-work proposal would stand; it had no intention of discharging employees to make room for an *en masse* return of strikers.

Saunders also told Lock that if an agreement was reached the Company wanted to give each striker 10 days to make known his desire to return because it had information that many strikers had no desire to return. He said the Company would then recall each employee by seniority district, and that while Respondent would continue to require the polygraph examination it would agree that the only reason to disqualify an individual from returning would be because of violence in connection with the strike.[11] He remembers Lock replied by asking for a definition of violence and he answered that Respondent would follow NLRB definitions, statutory definitions and court rulings.

Lock recalls there was a disagreement regarding whether the strike replacements were permanent or temporary. He says he asked Saunders why the replacements were being treated as permanent when Cooksey and Pickup had admitted they were temporary at the September unemployment compensation hearing. He remembers Saunders saying Nichols' May 10 letter was "self-explanatory," he knew nothing about the unemployment matter, that the strike replacements had become permanent when they had completed their 90-day probationary period.

Saunders testified: 1) he restated to Lock that those employees whose jobs had been eliminated were not to be recalled; 2) Respondent would assign work-weeks to strikers with normal right of bidding; 3) the strikers' seniority would be docked for the amount of time each striker spent on strike (excluding a 2 or 3 week grace period); 4) Respondent's economic offer remained the same as its April 7 offer; 5) the Union had never demonstrated its majority in the maintenance mechanics unit and recognition in that unit was deemed to have been dropped from the Union's demands; 6) even though they had agreed with respect to the driver's bid rules and even though Respondent had been following those rules a different work situation

[11] Up to that date no striker had been denied reinstatement on ground other than strike misconduct as determined by the polygraph.

had arisen and there was a corresponding need to readjust the rules. Saunders asserted that he was not reneging on their earlier agreement. He says Lock agreed that an adjustment of the rules had to be made.

Lock testified that at the September 28 meeting Saunders proposed that all further discussion would be contingent on the decertification petitions being resolved. Lock says he had shortly before learned from the NLRB's Regional Office that it was going to issue the instant complaints and the decertification petitions were to be administratively dismissed. Although it had not yet occurred, he advised Saunders he had heard from the Regional Office that the petitioners would be dismissed and it would do no good to hold up negotiations over that. He says Saunders replied he could not do anything until the matter was resolved and it might be 6 months or a year before an election was held. Whatever course the petitions took, according to Lock, Saunders said the Company's position was that until they were finally resolved the terms of a negotiated contract would not go into effect.

Lock also said, in terms different from those described by Saunders, that Respondent's September 28 proposal withdrew the "rebid" proposal made earlier because it did not expect large numbers of employees to return. He also says Saunders advised him for the first time that the produce packagers were not to be recalled because the Company was no longer in the potato bagging business. Lock admits he knew in July that the equipment had been sold. See my earlier discussion of this subject in footnote 8, *supra*, page 10. As I have said, Lock, therefore, apparently knew more in July than simply that the equipment had been sold.

Another meeting was held on September 29. The Union rejected Respondent's proposal of September 28, although, it appears that at least a large amount of it was acceptable, principally those items relating to contract terms. Lock says the Union offered to arbitrate over those strikers who were accused of misconduct. He also says Respondent continued to refuse the Union's offer that the employees return *en masse*, because 200 employees had filed the decertification petitions.

Saunders testified that on September 29 Lock said Respondent's back-to-work proposal was nearly acceptable, but

the Union wanted to limit the Company's refusal to recall only to those individuals who had been convicted of felonies. Saunders says Lock earlier had wanted everyone returned first and then arbitrate over individuals accused of lesser misconduct. Saunders repeated the previous stand that Respondent would not agree to bring back all the strikers at once or those who had taken other [permanent] employment.

On October 4, the Union's secretary-treasurer, Horace Manning, sent Respondent a mailgram stating it was acting on behalf of the strikers and "we are hereby making an unconditional offer on behalf of those employees to return to the same or substantially equivalent position to those which the employees held prior to the commencement of the strike. . . ." The mailgram continued, saying picketing would cease at 8 a.m. on October 5 and it set a deadline of 5 p.m. on October 6 for Respondent to accept that offer.

During the morning of October 5 another bargaining meeting was held. Lock had assumed Respondent had received the mailgram (in the mistaken belief that it had been a telegram). He told Saunders the Union was interested in the orderly return of the strikers and wanted them all returned to specific jobs and shifts. He said the Union was willing to go along with the return of 50 now followed by 50 each week thereafter. Saunders recalls him saying he did not wish returning strikers to be required to take polygraphs and he understood no physical examinations were being given so he was dropping that as a demand.

However, the meeting was disrupted at approximately 10 a.m. when Saunders' secretary came to the room with a copy of the mailgram. When Saunders read it he became angry with Lock, saying this was "crap." When Lock realized Saunders had not received the communique before the beginning of the meeting he apologized for assuming Saunders had. The apology was accepted but the parties adjourned until the following day while Respondent attempted to decipher the wire's meaning.

On October 6 the parties met again. Their discussion centered on the meaning of the mailgram. Lock says Saunders told him 50 employees could return by Sunday night (October 8) and also told him that Respondent was no longer requiring polygraph examinations; Saunders agrees, adding that polygraphing returning strikers had been discontinued on October 4.

During the meeting Saunders asked Lock for a list of those strikers who actually wanted to return to work. He says neither Respondent nor the Union was really certain which employees wanted to return. Saunders observed that a number of people had "terminated themselves." The record shows that some had retired and others had acquired permanent work elsewhere.[24]

Saunders says Respondent did offer to call back the top 50 on the seniority list and then follow the remainder of the list by seniority saying that an employee could ask for his old job or bid the shift and workweek. Saunders said that the Union did not agree to Respondent's proposal to return 50 employees immediately; apparently the Union was undecided on the topic. It took a stand several days later. However, Respondent maintained its position with respect to violence and its decision not to recall those whose jobs had been eliminated.

Saunders also told Lock there was a need to discuss some other matters. These topics included the exclusion of certain clerk duties from the bargaining unit, discussing a polygraph clause, opening up certain starting times and renegotiating the drivers' bid rules. He remembers that the Union asked for a change with respect to the information shown on paystubs.

In addition, Saunders told Lock Respondent would not give strikers full seniority credit for the amount of time they had been on strike and the implementation of any contracts which were reached would be after the resolution of the decertification petitions in both the warehouse and cash-and-carry bargaining units. The latter two statements drew an angry response from the union negotiators who told him "the clock starts running for you at 5 p.m. tonight," a reference to the Union's belief that it was an unfair labor practice strike as of that moment. Either Lock or some other union official also stated the decertification petitions had already been resolved.

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[24] Although neither the Union nor Respondent was fully aware of the desires of many of these employees, it is clear that Respondent's information, though vague, was to a large degree correct. It later sent letters to specific employees offering them reinstatement. The letters referred to Respondent's current belief regarding the striker's status (retired, accepted permanent employment elsewhere, etc.) and set a deadline by which the striker should reply if he or she wished to return. More than 50 failed to answer.

Saunders responded that the decertification petitions had not been dismissed and even if they had been, they could be reinstated. Lock also asserted that only those strike replacements who had been hired prior to May 18 were permanent.

On October 9 Lock sent Saunders a letter transmitting a copy of Respondent's seniority roster as of March 29. He asserted that all the employees on the list wished to return to work. The letter also remarked with respect to the Company's offer to return 50 employees immediately that the Union recognized that proposal as a "good-faith attempt" to begin the return to work which would "at the same time reduce [Respondent's] possible liability before the National Labor Relations Board." He asserted that the Union did not intend to negotiate away the striking employees' rights to return where the NLRB had "jurisdiction." The Union therefore agreed that those 50 should be immediately returned to work.

On October 10 another bargaining session was conducted. The parties are in agreement that Saunders, with Lock's October 9 letter in hand, replied that the October 6 proposal to return 50 employees immediately was a "package deal" which included the other proposals and that the Union could not accept part and reject part. Moreover, Saunders asserted that the March 29 seniority list was not appropriate as they needed the names of people who actually wished to return. Lock replied that the Union was afraid to compile a new list because it feared it might make a mistake. Saunders said the Union agreed to furnish another list. Saunders said Respondent was compiling, as they applied, a list of employees who had offered to return plus a list of those people who had worked during the strike. He said Respondent would give a week's notice to people who wished to return. He says Lock asked for a list of people about whom the Company had evidence of violence and did not wish to take back. Saunders said a list would be prepared and provided.

A discussion then ensued respecting the clerical duties performed by certain warehousemen including grocery load checkers, salvage clerks, receiving clerks and inventory control clerks. These were duties performed by warehouse clericals but not on a regular basis and no employee actually held those job titles. Respondent proposed that those duties be excluded

from the bargaining unit. It also proposed that the contract provide for some flexibility with respect to schedule changes—up to a maximum of 2 hours change in schedule per week.

It was during this meeting that Respondent actually presented its polygraph proposal. See GC Exhibit No. 27. The proposal permitted Respondent to polygraph any employee or group of employees it "suspected of dishonesty" and also provided for routine testing. Lock opposed it as a "back door" way of resuming polygraph testing.

Lock says that it was at this meeting that the Company again said it was taking seniority away from strikers, and the loss would apply against the accumulation of sick leave and vacation benefits. He says this was the first time Respondent had explained how that loss would work in practice. The vacation and sick leave plans in the expired contract relied on seniority in different ways. Sick leave was based solely on seniority, while vacation combined seniority with a credit based on the number of hours worked during the year. Saunders also said that the actual settlement of a contract was still contingent on dropping the instant charges.

Later that day the Union organized an *en masse* return of employees. Approximately 130 ex-strikers applied for reinstatement. That was followed on the next day, October 11, by the Regional Director's issuance of his dismissal of the decertification petition in Case No. 28-RD-314, relating to the warehouse unit. (Presumably the petition in the cash-and-carry unit was also dismissed on that date, though the record does not so show.)

The next meeting was held on October 12. At that meeting the Union's position remained essentially the same as before. It wanted those individuals who had been convicted of felonies to be returned, but offered to arbitrate over them.[24] It also wanted a list of the employees involved in violence. Respondent gave the Union a list of people who had remained at work during the strike or who had been hired during the strike and who were still employed. Saunders says Lock also asked for consideration for older employees with respect to jobs they could

[24] Saunder's testimony. If he is correct here, the Union appears to have returned to the position it held prior to September 29, when it made a shift more favorable to Respondent.

not handle and Respondent agreed to offer them the jobs as they opened but to permit them to pass if they believed themselves unable to perform them. The Union also asked for information regarding replaced bargaining unit people during the period of April 12 through May 18 together with the names of individuals who replaced them.

On the proposal regarding the right to change starting times, Saunders conceded to Lock that Respondent had not yet changed its schedules as contemplated but simply wanted the flexibility to do so. During this meeting, according to Saunders, Lock agreed that Respondent would not be obligated to pay the April 7 wage increase on a retroactive basis. He opposed excluding the clerk duties from the definition of unit work. The Union also agreed to review the proposal with respect to the janitors and pallet repair people and also the drivers' seniority rules. The Union withdrew its demand for recognition in the maintenance employees unit as it had not gotten the additional authorization card. It also agreed to bargain on Respondent's polygraph clause proposal and asked for more information about it. Lock again stated that conditioning settlement of the contract on the resolution of the decertification petitions was inappropriate. Saunders reiterated that the petitions could still be reinstated.

Respondent continued its proposal that the former strikers were not to be credited with seniority for the amount of time that they had been on strike; Lock opposed that saying that the employees had suffered enough. Respondent also gave the Union a copy of its list of all those employees who had applied for work on October 10.

On October 27 still another meeting was conducted. Saunders told Lock that Respondent was ready to discuss issues covering the cash-and-carry unit; he also said the list of employees whom Respondent did not wish to recall was not ready and he agreed to furnish the Union with a list of employees who had quit. Lock said it was during this meeting that there was a discussion about giving older employees some relief over onerous jobs and Respondent agreed to accommodate those people as best it could. The accommodation was a form of permitting those people on the seniority list to pass until a job came open on their old shift. (Saunders said that had occurred

on October 12.) During this meeting there was an agreement regarding the recall of garage mechanics. Respondent also agreed to the Union's request to provide a list of resident drivers on the payroll as of March 29 who were still on the payroll and to provide a list of meat employees who were laid off on October 13. The paystub breakdown was clarified in order to show what amounts were being paid as straight time, overtime, holiday pay, etc. There was no agreement on the recall of employees. Lock asserted that the employees should be recalled as if they were unfair labor practice strikers; Respondent countered that it was an economic strike and they would be treated as economic strikers.

On November 1 another meeting was conducted. It was called principally to deal with the cash-and-carry unit although an attempt was made to straighten out some confusion over the driver's seniority rules. According to Saunders that was abandoned because there were "too many cooks" and not enough in the way of knowledge. With respect to the warehouse unit, however, Saunders testified Respondent gave the Union four lists; those strikers who were ineligible for return due to strike misconduct; those strikers who had terminated themselves; the resident drivers; and meat department layoffs. Also at that time Lock gave Respondent the Union's counterproposal on polygraphing.[26]

In the cash-and-carry unit Respondent made a proposal to deal with the problem of cash-and-carry cashiers. These individuals performed both supervisory and rank-and-file duties. According to Lock Respondent proposed to "do away with the bargaining unit function of cashiering"—indeed, it appeared to the Union that that had already occurred. Saunders explained that in the past the Union had by agreement permitted the supervisor to do bargaining unit work in order to permit him to get union retirement benefits. He explained that the change in

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[26] The Union's counterproposal regarding polygraphs is set forth in GC Exhibit No. 32 and permitted Respondent to continue its practice of polygraphing employment applicants but also provided that the Company could require polygraph examinations of current employees if there was substantial evidence to indicate the employee to be guilty of theft. It limited the scope of the exam to the incident under scrutiny and also prohibited its use as evidence in an arbitration hearing.

duties really required the cashier-manager to abandon his cashiering duties in favor of management duties and caused Respondent to hire a new category, cash-and-carry cashiers. Respondent had already hired such individuals but was paying them a lower rate than that previously paid to the combination cashier-managers.

The Union's original proposal, GC Exhibit No. 31, probably induced Respondent's action on the cash-and-carry cashiers, for the Union's third proposal on that exhibit provided that the agreement for nonbargaining unit people (supervisory personnel) to work in the nonfood area would be terminated retroactive to February 28. As this was confusing, Respondent agreed to provide the Union with a formal job description of the cashier's job. It actually did so at the next meeting.

That meeting was held on November 9. Saunders first added a name to the list of individuals whom Respondent considered ineligible for return because of strike misconduct. Although the Union's original proposal was to modify the sick leave plan slightly, the bargaining process had left it unchanged until, on November 9, Respondent proposed a change. (See GC Exhibit No. 33.) Saunders, observing that sick leave was based on seniority alone, without considering the hours worked by a claimant, and aware that a returning striker could immediately obtain a full 6-day sick leave credit for the time spent on strike, said that was unfair. He submitted a written proposal that the sick leave plan take into account the amount of hours worked as well. The proposal was designed to be consistent with the existing vacation plan.

According to Lock, Respondent withdrew the proposal it made on October 6 that 50 employees would return immediately. He says Saunders repeated that the contract was subject to the decertification petitions being resolved and the charges being withdrawn. He also says Saunders proposed that the same discharge and suspension articles as used in the warehouse contract be applied to the cash-and-carry contract. Similarly, the cash-and-carry contract was to contain the warehouse language covering annual reviews and vacations.

Saunders testified that during the November 9 meeting they were able to nearly finalize the drivers' bid problem. He also said that while the economic and noneconomic proposals

remained essentially the same, Respondent wished to bargain further over the clerical jobs in the warehouse and as a result gave the Union job descriptions of the duties assigned the warehouse checker and salvage room clerk functions. (GC Exhibits No. 34 and 35.) Respondent wished to take those duties from the warehousemen.

Respondent offered to include the custodian, janitors and pallet repair people in the warehouse contract rather than as a separate unit; it continued to seek the authority to change the starting times, continued to stick with its own polygraph proposal and while Saunders admitted saying the contracts were contingent on the resolution of the decertification petitions he also testified that he told Lock that Respondent might drop those demands if they got to an impasse on them. Lock denies the last statement.

In addition, Saunders testified, without Lock's disagreement, that Respondent dropped its proposal to dock strikers seniority credit for the amount of time they had spent on strike, except for sick leave (wanting it to be consistent with its proposal that day) but offered a pro rata adjustment on that.

The parties were still in disagreement on the legal status of the strikers. Respondent said it would continue to treat the strikers as economic strikers and would return them in accordance with the rules pertaining to economic strikers. Saunders told the Union that it was using the Union's seniority list and that senior employees who did not wish reinstatement to jobs other than their own did not lose their place when they passed. He also advised that polygraphs had not been used at all since October 13 (although earlier he said as a mandatory requirement the exams had ended on October 4).[17]

The last meeting was conducted on November 14 and solely related to the cash-and-carry unit. At that point there was agreement that the cash-and-carry contract would carry all the new benefits negotiated in the warehouse agreement. Nonetheless, there was no bargain struck because of the disagreement over the question of recall rights. Respondent continued to insist that it would recall people as economic strikers and observed it was doing so. The Union demanded the ouster of all strike

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[17] It is not clear whether the October 13 polygraphing was mandatory or voluntary.

replacements hired after May 17, saying that the strike had converted to an unfair labor practice strike at that point, and even if it had not, the replacements were only temporaries.

While there may facially appear to be a wide gulf between Lock's and Saunders' testimony on bargaining, in fact the differences are not great. I asked Saunders, who had carefully listened to Lock's testimony, to detail his differences with Lock. Aside from discrepancies on dates, Saunders challenges Lock's testimony in only a few instances.[38] First, Saunders says he told Lock about Respondent's decision to cease potato bagging on either May 17 or June 1, not September or October. Second, he says Lock omitted[39] Saunders' statements on November 9 to the effect that neither the resolution of the decertification petitions or the withdrawal of the unfair labor practice charges would be allowed to block an agreement if one were actually reached; third, Lock omitted the November 9 change in Respondent's position on docking strikers' seniority for the amount of time they spent on strike.

Thus, while I run the risk of oversimplifying the factual disputes, it is apparent that many of the Union's original demands fell by the wayside as the strike progressed. By the time of the last meeting the Union was ready to accept Respondent's April 7 proposal and would have done so if there had been an agreement over returning the strikers to work. It is true that there remained some minor issues such as the Company's proposals with regard to the polygraph requirement and modifying (by both deletion and addition) work in the warehouse and cash-and-carry bargaining units.

Nonetheless, I think it reasonable to conclude that those substantive issues would not have deterred the parties from reaching agreement. In fact, both Lock and Saunders are in tacit agreement with that conclusion.

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[38] In the following list I have omitted Saunders' assertions about the May 17 meeting's reference to polygraphs and his remark that in September and October Lock asked for job descriptions relating to warehouse clerks and cash-and-carry cashiers but never bargained about them.

[39] Actually Lock denied, rather than omitted, what Saunders says occurred.

F. *Industrial Vehicle Testing*

John Lopez, Respondent's training supervisor since 1970, testified that beginning in 1972 Respondent established training and testing programs for its employees. The purpose of these programs was to require employees to demonstrate their ability to operate the equipment safely. According to Lopez, actual testing on forklifts and industrial tugs began in 1974. The tests were principally given to new hires and were, he testified, an attempt to meet standards set forth in federal regulations under the Occupational Safety and Health Act. To this end, he assembled study materials and drafted written and driving tests.

Lopez testified that although it was his intention to eventually test all Respondent's employees who were driving forklifts or tugs, due to employee turnover it was easiest and most efficient to test new hires. With the advent of the strike in early 1978, he says he was unable to even do that because of the great turnover and emergency need to "get people operational." However, he resumed testing in early 1979. The test was the same as that which had been given earlier.

Returning striker Bruce Anderson came back to work on November 16, 1978. Previously he had been employed as a forklift operator engaged in line stocking. When he returned he was told he might have to take the industrial equipment test (he referred to it as the forklift test). Consistent with Respondent's policy of treating returning strikers as having the rights of economic strikers, Anderson was assigned a tug instead of a forklift and given a different shift and a different job to perform. Indeed, on the shift to which he was assigned the tug driver had specific production standards to meet. Forklift drivers did not have such standards. There is no allegation that this assignment was anything other than proper under the economic striker reinstatement rules.

In February someone in a supervisory capacity told Anderson that he might be returned to the forklift upon his passing the test. He was given a manual to study and was only asked to take the written test. Nonetheless, he failed it. He admits he was offered a second opportunity to take the test but refused saying he didn't want to. He was returned to tug duties and ultimately discharged for failing to meet the production standards required

in that job. He testified that the operation of the forklift and the operation of the tugs are quite similar. It appears that the tug operates much like the forklift except without the lift capability.

IV. Analysis and Conclusions

While the General Counsel's complaints are multi-faceted and generally allege violations of Section 8(a)(1), (3) and (5) of the Act, their thrust is the contention that Respondent's establishment of the polygraph requirement for returning strikers violated the Act in several respects. An analysis of the three complaints, as amended, shows that much if not all of the remaining alleged illegal activity of Respondent depends on a finding in the first instance that the institution of the polygraph test in June was unlawful. The General Counsel further alleges that if the polygraph was unlawful, its use converted the original economic strike to an unfair labor practice strike. If that occurred then Respondent's admitted treatment of strikers seeking reinstatement would have been additional violations of the Act, for it viewed each striker as entitled only to the rights of an economic striker.

The only sections of the complaints which are independent of the polygraph/strike replacement issue are found in the complaint in 28-CA-5153 which principally deal with conduct beginning in September, well after the Union's strike began to flag. However, two paragraphs in that complaint allege that Respondent has engaged in two earlier unlawful unilateral changes. The first is a claim that on June 27 Respondent unilaterally and without notice to the Union eliminated the jobs of potato baggers. The second alleges that Respondent unilaterally and without notice to the Union changed the probationary period for new hires from 60 to 90 days. The allegations relating to the latter portion of the strike and the September-October negotiations accuse Respondent of unilaterally removing certain clerical functions from the warehouse unit, unilaterally removing cashiers from the cash-and-carry unit and unilaterally testing industrial truckdrivers. In addition, Respondent is accused of refusing to bargain by proposing to deduct strike time from the seniority of returning strikers, conditioning agreements in the two units on holding the elections sought by the two decertification

petitions and conditioning an agreement on the withdrawal of the unfair labor practice charges. Finally, there is an allegation that beginning in September Respondent made a number of changes in its proposals. All of this, alleges the General Counsel, amounts to "surface bargaining."

During the course of the hearing counsel for the General Counsel refined the threshold theory. He stated:

> The General Counsel's whole theory is that the polygraph test is imposing [an] unlawful condition upon the reinstatement rights of strikers whether you label them temporary or permanent strikers, that doesn't matter now. Having made an unconditional offer for reinstatement the Respondent has the burden to reinstate the individual; absent some affirmative defenses, requiring the individual to take a polygraph test, which we deem to be an unlawful condition, does not fulfill Respondent's affirmative action in terms of unconditional application for reinstatement.

He goes on to say that all of the strikers are discriminatees (except for a named few who lost their protected status)—including people who took the polygraph test and failed it, people who took the polygraph test and passed it and people who did not take the test. The only difference with respect to each of these categories is the appropriate remedy and the amount of backpay due each. In their brief, the General Counsel's representatives further argue that the imposition of the polygraph test was "inherently destructive" of the right to strike as guaranteed in Section 7 of the Act; alternatively, they argue that it was a reprisal against those who engaged in the strike and in any event was applied unevenly as nonstrikers were not obligated to take the test.

The first question I must answer is whether or not polygraphing returning strikers to test them to determine whether or not they engaged in strike misconduct or knew about the strike misconduct of others, can be in-and-of itself an unfair labor practice and if so whether or not it is "inherently destructive" of the statutorily protected right to strike. The question must be answered in the context of the strike itself.

This strike was marked by extensive violence which Respondent tolerated from its inception on April 12 until June 5. At that point the violence had escalated to a point where it may be fairly said that Respondent was under siege. The entrances to the facility were being sabotaged; persons who were entering and exiting were being subjected to harassment, physical attacks and sabotage; on May 23 there was an arson incident and between May 30 and June 2 there were a series of shootings. Many of the incidents were of a clandestine or hit-and-run nature and Respondent had no idea who the prepetrators were, how they might next act or where they might engage in similar acts. By then some of the strikers were beginning to filter back to work and Respondent, as testified to by president Nichols, could expect continued violence on the outside but could also reasonably fear that a returning striker might insinuate himself in the plant and become either a saboteur or an agent provocateur. He feared, rightly, that someone might shortly be killed.

Accordingly, Respondent decided to expand its use of the polygraph in the hope that it would identify those who had engaged in misconduct, deter those who had engaged in misconduct from returning and deter those who had not yet engaged in misconduct from doing so.

As Mr. Justice Roberts stated in *N.L.R.B.* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, at 345 (1938):

> ...although § 13 [of the NLRA] provides, "nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers.

An employer may not, however, go beyond what is necessary to protect itself in that circumstance. Chairman Fanning has stated, "When employee rights under the Act conflict with those of the employer, the employer is entitled to respond; but the response must be no more than sufficient to a legitimate business objec-

tive."[39] While it may be fairly observed that the Chairman's statement was made in a context dealing with an alleged reprisal against strikers and while Judge Friendly's remark which the Chairman paraphrased dealt with the employer's right to replace strikers, nonetheless the logic has close application here. The only question is whether Respondent's response to the violence exceeded reasonableness under the circumstances.

Approaching the same problem from a different point of view in *Medicenter, Mid-South Hospital,* 221 NLRB 670, fn. 2, Chairman Murphy, in a polygraph context, stated she

> would not have found a violation in any event since... the widespread sabotage and vandalism of the hospital's facilities that were occurring daily created an emergency situation excusing or justifying such unilateral action as a temporary measure to try and bring that situation under control.

For that proposition she cited *N.L.R.B.* v. *Cone Mills Corporation,* 373 F.2d 595 (C.A. 2, 1967) and *New York Mirror, Division of the Hearst Corporation,* 151 NLRB 834 (1965). See also *N.L.R.B.* v. *Katz,* 369 U.S. 736 at 747 (1962).

Whether one analyzes the issues as a question of overreaching in seeking self-protection as it appears Chairman Fanning would, or whether one analyzes the problem as one of an emergency justifying unilateral activity as apparently Chairman Murphy would, the result is the same under the facts extant here. Respondent did no more than to forcefully pour oil on troubled waters. That act protected its ability to operate its business free of serious illegal harassment and had the tendency to deter additional violent acts. Its requiring returning strikers to take the polygraph test in no way impeded their right to engage in a lawful strike nor was it a reprisal against their strike. If it is regarded as an emergency measure, it did no more than isolate the perpetrators of unlawful conduct (whether by their

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[39] See the Chairman's concurring opinion in the *Chevron USA, Inc.,* 244 NLRB No. 160, slip op. at 21, fn. 32, citing Chief Judge Friendly's decision in *H & F Binch Co.,* v. *N.L.R.B.,* 456 F.2d 357 (C.A. 2, 1972).

admission or by their failure to pass.)[31] The only thing it discouraged was strikers' unlawful conduct.

It may well be that the use of a polygraph, rather than traditional investigative methods, was unique here. Nonetheless, no state law prohibited its use.[32] Indeed the National Labor Relations Act does not prohibit its use *per se.*[33] To the contrary, the

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[31] Respondent's president, Nihcols, made the decision to deny or grant reinstatement to those individuals who failed the lie detector test. Of the seven employees for whom Nichols denied reinstatement, the General Counsel stipulated that what they said during their examination was true. Six (Updegrove, Bennett, Nealis, Karch, and Mendevil) made admissions with respect to their involvement in strike violence. (The seventh, Ebarb, was not reinstated because he attempted to sell cigarettes taken from Respondent to a merchant in Tucson. See below. Updegrove was reinstated later on Nichols' belief that he was readily influenced by others. Aside from their admissions, Nichols also relied on the "deceptiveness" which an employee may have shown while connected to the instrument.

While four of these people are named in the complaint as discriminates, the 8(a)(3) violation with respect to them (Bennett, Ebarb, Updegrove and Karch) was bottomed on their answers given during the allegedly illegal examination. Whether these four (and the remaining three) were discharged because they had actually engaged in misconduct was not truly litigated.

The General Counsel argues that an unlawful motive should be found with regard to the polygraphing system because each employee who underwent it was asked questions ranging beyond strike-related violence. Those questions dealt with such matters as dishonesty, theft and use of drugs or liquor on the job. These matters would be of concern if a striker's admissions to such transgressions affected his reinstatement. See *Markle Mfg. Company of San Antonio,* 239 NLRB No. 168. However, there is no evidence that any striker was denied reinstatement because of nonstrike related misconduct. The only possible exception to that would be Ebarb. Even so, prior to his being polygraphed Respondent already had acquired evidence, submitted by a Tucson merchant and confirmed through tax stamp records, that Ebarb was selling cigarettes which had come from Respondent's warehouse. His polygraph reading had nothing to do with Respondent's decision to terminate him.

[32] See Craver, *The Inquisitorial Process in Private Employment,* 63 Corn. L. Rev. 1 at 29, fn. 124, for a recent listing of state laws regulating the use of lie detector tests in employment. Arizona law does not prohibit such tests.

[33] This is not to say that its use would not be illegal if it were being used as a reprisal against employees who have engaged in an activity protected by the Act.

Board had held in *Medicenter, supra,* that a polygraph examination is a mandatory subject of bargaining. Thus, to that extent at least, the Board has held lie detector tests to be a permissible tool in the field of labor relations. I cannot accept, therefore, the General Counsel's assertion that the use of the polygraph examination here was inherently destructive of the right to strike. As the Board has mandated parties bargain on that topic if one party insists, it seems anomalous to take the position that the topic is "inherently destructive" of a statutory right and I am not willing to draw that conclusion. That is particularly so here, where Respondent's action was designed only to protect itself in an emergency.

Recently the Board in *Fleenor d/b/a 7-Eleven Food Store,* 242 NLRB No. 29, said it was not reversible error in the context of that case to deny receipt of evidence tending to show the "inherent coerciveness" of polygraph tests. In most respects that case is unlike this one, but the Board's statement appears to express doubt that polygraphs are inherently destructive of Section 7 rights.

Better evidence that lie detector tests are not inherently destructive of such rights comes from this record itself. First, when Respondent made its polygraph proposal, the Union, recognizing its obligation under *Medicenter, supra,* sought further information and made a counterproposal. Its counterproposal accepted the polygraph as a concept, although the Union wished to limit its use. It made no protest that the test was coercive. Second, the testimony of the witnesses, although there is some variance, does not in objective terms conclusively show coercion. Indeed, of the 12 who testified (omitting Veach and Conroy who were not truly seeking reinstatement), none flatly objected to the polygraph *per se;* most were deterred from returning by other factors: e.g., fear of violence or union loyalties. Only three expressed opposition to the test, but their opposition was mixed with other reasons for not wishing to return. One gave such equivocal answers his reasons cannot be deciphered. The sum here is that even if there is an emotional discomfort associated with the test it is not inherently coercive of the right to strike.

It is of course possible that a violation could be found even if the polygraph is less than "inherently destructive." As the

Supreme Court said in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967):

> ...if the adverse effect of the [allegedly] discriminatory conduct on employee rights is comparatively slight, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justification for the conduct.

If I assume that the polygraph did have a "comparatively slight" adverse effect on the right to strike, it is clear that Respondent has a legitimate and substantial business justification for polygraphing returnees–cooling off a hot, violent siege. Moreover, the General Counsel has failed, at this stage of the strike, to show an antiunion motivation. Thus, even under the "less than inherently destructive" analysis, no violation has been shown.

It is no answer to say, as the General Counsel does, that the polygraph was applied only to strikers rather than nonstrikers and therefore must be an illegal reprisal for it was disparately applied. In this case it was totally reasonable for Respondent to have concluded that its striking employees, rather than its nonstriking employees, were the root of the violence. To turn that analysis into a disparate application of the polygraph examination to warrant the conclusion that the strikers were being discriminated against is a legal contortion which is not justified. Accordingly, I conclude that Respondent has a substantial business justification in requiring its returning strikers to submit to polygraph examinations and that the test was neither inherently destructive of the statutory right to strike nor was it applied in a manner shown to be designed to punish employees for engaging in that right. It follows therefore that Respondent's unilateral implementation of the polygraph testing system did not violate the Act and that it did not convert the strike to an unfair labor practice strike.

There remains for consideration the question of whether or not Respondent violated Section 8(a)(5) in any other manner. With respect to the elimination of the produce packagers, it is clear that the Union was on notice at least by July 14 that the

Company had gone out of that phase of the grocery wholesaling business. On that date copies of Respondent's layoff letters to the produce packagers were sent to the Union's chief negotiator, Lock. In footnote 8, *supra*, I observed that Saunders probably informed Lock either on or before June 1 that the potato baggers' jobs were shortly to be eliminated. Lock's testimony that he did not learn of that decision until September or October upon the resumption of bargaining may well be accurate in the sense that he may not have grasped the meaning of the June 1 statement or may have been unaware that the July 14 letters had been sent. That, however, is not due to Respondent's failure to meet its statutory obligation to notify the Union. Both Saunders and the letters clearly accomplished that.

However, the complaint may, though it does not clearly do so, be read to allege that Respondent failed to bargain over its decision to discontinue the produce packaging. I am unconvinced that it had an obligation to do so in view of the Board's decision in *Summit Tooling Co.*, 195 NLRB 479 at 480, and cases cited in fn. 4. In that case the employer unilaterally discontinued a product line but the Board held the employer was not required to negotiate over the decision to terminate it. Similarly, Respondent merely discontinued packaging potatoes which I view as directly analogous as discontinuing a product line. In that circumstance Respondent was under no obligation to bargain over its decision to terminate that portion of its business. Moreover, Respondent was willing to bargain over the effects the closure would have on those employees who served as potato packagers and offered to do so. Indeed, early on, when it came to the question of reinstating strikers, it did not reject the concept of reinstating the produce packagers to other positions so long as their recall did not affect the higher reinstatement rights of employees whose jobs had not been eliminated.

With respect to the allegation that Respondent unlawfully changed its probationary period from 60 to 90 days during the course of the strike, I likewise conclude that Respondent has committed no violation of the Act. Article 4 of the expired collective-bargaining agreement set forth a 60-day probationary period for new hires. That agreement expired on February 28 and was not extended. When the strike began on April 12 Respondent began hiring replacements. At some point, not clearly

shown in the record, it changed the policy, granting its newly hired employees a 90-day probationary period. In addition, because the health and welfare plan negotiated by the Union was also not operating, it permitted the strike replacements to take advantage of its health insurance plan then applicable to non-unit employees. That plan required an employee to be employed for 3 calendar months before becoming eligible. In a sense, then, by extending the 90-day probationary period Respondent made it approximately coterminus with eligibility for the health plan.[34] There is no claim that Respondent engaged in any misconduct with respect to its handling of the health and welfare situation.

Respondent, however, does not cite that as the reason for its decision to extend the probationary period from 60 to 90 days. Instead, it argues that the Union was aware of the change and its failure to bargain over the topic constitutes a waiver of its right to do so. It is clear that a probationary period is a mandatory subject of bargaining and normally a failure to bargain about a change in such a topic, particularly where it has been reduced to contract form, would be unlawful. I am, therefore, not particularly persuaded by Respondent's argument that the Union waived any rights with respect to it. Nonetheless, there are a number of defects in the General Counsel's allegation. First, it has not clearly been shown when the policy was changed; the complaint alleges that the change occurred on June 27. Nichols' May 10 letter refers to a 90-day probationary period. If that is the date the policy was changed it is outside the scope of Section 10(b); there is no evidence that the Union was unaware of it. Second, the change appears to be not a detriment to the bargaining unit; if anything, it is more likely a benefit. It occurred at a time when Respondent was hiring strike replacements and, had the strike been less than 90 days, may have been used as a means of ousting strike replacements in favor of returning strikers. Thus, the returning strikers would have had an additional 30 days to get their jobs back. Conversely, of course, it may be argued that it gave strike replacements a

[34] For those who were hired on the first of a month, the 90 days was nearly exactly the same as 3 calendar months. For those unfortunate enough to have been hired toward the end of a month their wait for health coverage would be almost 4 months.

longer time in which to learn their jobs, thereby reducing the risk of discharge for failure to become proficient. Even if that argument is accepted, assuming that the policy were to remain the same after all the strikers returned, the 90-day benefit would then extend to new hires who were not strike replacements but who would have come from the same community mix as in nonstrike circumstances and those employees would have been given 30 days additional time to learn their jobs. In consideration of these factors, particularly that it is in all probability more of a benefit than a detriment and because it had no impact on the course of bargaining, or length of the strike or on the amount of bargaining unit work, I do not believe it is a violation of Section 8(a)(5). Even if it is, a remedial order is not warranted.

Such an order is certainly not warranted in remedying the probationary period issue when one takes into consideration the fact that the decertification petition covering the warehouse unit was filed on June 9, 18 days before the date the General Counsel alleged the violation occurred. Indeed, that is a problem which faces all of the remaining allegations accusing Respondent of refusing to bargain. In various ways those all charge Respondent, beginning with the September 28 meeting, of refusing to bargain in good faith. As the cash-and-carry decertification petition was filed on August 28 the same can be said for that unit as well.

It is well settled, of course, that an incumbent union enjoys the presumption of majority status during the course of a contract term, but the presumption may be rebutted upon the expiration of the agreement. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962, enf. den. on other grounds, sub. nom. *N.L.R.B.* v. *Tragniew, Inc. and Consolidated Hotels of California*, 470 F.2d 669 (C.A. 9, 1972). The presumption can be rebutted by evidence showing that the labor organization has lost its majority status (*Celanese Corporation of America*, 95 NLRB 664[11]) or by a reasonably based doubt as to the continued majority status of the union, so long as there are objective considerations on which the employer may rely and if

[11] See also *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 at 104, fn. 18 (1954).

the atmosphere is free of unfair labor practices. See *Guerdon Industries, Inc., Armor Mobile Homes Div.*, 218 NLRB 658 and *Nu-Southern Dyeing & Finishing, Inc. and Henderson Combining Co.*, 179 NLRB 573, fn. 1, enf. in part, 444 F.2d 11 (C.A. 4, 1971). The presumption may also be rebutted by the raising of a question concerning representation through the filing or a properly supported petition pursuant to Section 9(c) of the Act. See *Telautograph Corporation*, 199 NLRB 892, following *Shea Chemical Corporation*, 121 NLRB 1027, a case which was arguably distinguishable as involving rival unions. To clarify its view that there is no distinction between cases involving rival unions and cases involving employee attempts to oust an incumbent, the Board said the rules should be the same where a question concerning representation has been raised by the timely filing of a decertification petition. In that circumstance the bargaining obligation ceases until the question concerning representation has been resolved. *Turbodyne Corporation, Gas Turbine Division*, 226 NLRB 522 and *Vernon Mfg. Co.*, 214 NLRB 285 at 287, reaffirmed 219 NLRB 622.

Where the bargaining obligation halts upon the raising of a question concerning representation, that obligation ends with respect to unilateral changes as well, *Vernon Mfg. Co., supra*, and *Ellex Transportation, Inc.*, 217 NLRB 750, each of which involved a decertification petition. See also *Upper Mississippi Towing Corp.*, 246 NLRB No. 41, citing the *Freeman Company*, 194 NLRB 595, and *Paramount Paper Products Co.*, 154 NLRB 1064.

These principles clearly have application in the instant case, as the warehouse decertification was filed on June 9, well before the bargaining misconduct as alleged. But General Counsel avers that no majority question is presented by the decertification petitions because Respondent admitted in its answer that the Union was the majority representative at pertinent times. Frankly, that argument begs the question. Respondent undoubtedly was aware that the Union enjoyed a presumption of majority under *Barrington Plaza*, yet it possessed no objective considerations showing the Union's loss of majority. Thus Respondent was not prepared to challenge the Union's majority status. Moreover, its answer is consistent with its argument throughout the case that it had no interest in

ousting the Union as the employee representative. That is not to say, however, that it would stand in the way of an employee-raised question concerning representation. Indeed, its stance during the October and November bargaining was that it would continue to bargain with the Union and hopefully reach a contract, though one could not actually be implemented until the decertification petitions were resolved. Respondent therefore was walking a narrow path between the Union on the one hand, wishing to reach an agreement if it could, while at the same time not treading on the rights of employees who sought a representation election to reexamine the Union's majority status.

When the General Counsel determined that a Section 8(a)(5) complaint was warranted on the question of polygraphing strikers, the Regional Director dismissed the decertification petition. He did not dismiss it on the ground that there was a showing of interest insufficient to warrant an election; rather he dismissed it on the basis that he believed Respondent's polygraphing returning strikers was unlawful and that a question of representation could not be raised. As I have found that not to have been the case, it follows that the decertification petitions had validity for I must presume that a sufficient showing of interest had been made. If such a showing had not been made, the petition would have been dismissed on that ground instead.[36] Thus, I conclude that a real question concerning representation was raised both in the warehouse and in the cash-and-carry units by the filing of the two decertification petitions because they were not preceded by any unfair labor practices committed by Respondent. Real questions concerning representation having been raised by the petitions, it follows that Respondent's post-petition conduct is not cognizable under Section 8(a)(5) for it was under no obligation to bargain until the question was resolved. These allegations are therefore without merit and should be dismissed.

Even so, the merits of the post-petition allegations are doubtful. First, while it is unlawful to insist to impasse on a nonmandatory bargaining proposal (*N.L.R.B.* v. *Wooster*

[36] See Section 101.18 of the Board's Statement of Procedure, Series 8 as amended.

Div. of Borg-Warner Corp., 356 U.S. 342 (1958)), it does not appear that Respondent did so. If any impasse existed by November 14, the date of the last bargaining session, it was over the back-to-work issue, not over the nonmandatory subject of withdrawing the unfair labor practice charges. Thus, it is unnecessary to determine the relative credibility of Saunders or Lock on that topic.[37]

Second, upon resumption of bargaining Respondent proposed the removal of certain warehouse work from the unit. That was a mandatory bargaining subject and Respondent engaged in no misconduct with respect to it. Saunders explained Respondent's reasons and provided the Union with the information it then sought. Lock's testimony that Saunders on October 10 told him those functions had "already" been removed from the unit does not establish a *fait accompli*. It does not show to whom the work was given, the amount of lost work, when it occurred, or if it was the result of changed circumstances caused by the strike. All of that is guesswork on this record. Even so, it appears to me that Respondent gave the Union full opportunity to bargain over the topic.

Third, Respondent's removal of the combination manager-cashiers from the cash-and-carry unit was within its prerogative under Board law. Those individuals were supervisors and bargaining over supervisors is a consensual, nonmandatory matter. By refusing to allow bargaining over the combination manager-cashiers Respondent was effectively withdrawing that consent. Under well-settled principles of Board law it was privileged to do so. *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005; *Houston Chronicle Pub. Co.*, 194 NLRB 1154.

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[37] The two cases cited by the General Counsel are not apposite in any event. *Stackpole Components Co.*, 232 NLRB 723 and *Star Mfg. Co.*, 220 NLRB 582 at 590. In those cases the tactic of conditioning a collective-bargaining contract on the withdrawal of unfair labor practice charges occurred as one of several devices by which each employer was attempting to avoid a contract. That did not occur here and even if Lock is to be credited Respondent's proposal appears to be simply a proposal to reach a common *quid pro quo* to the effect that if an agreement is reached all accusations would be dropped in order that a new contract term could begin afresh and without past recriminations. Compare *United Mineworkers of America, Local No. 1854 (AMAX Coal Company)*, 238 NLRB No. 214, ALJD at 64-66.

Cf. *National Fresh Fruit & Vegetable Co.*, 227 NLRB 2014,[37a] where the Board said in the converse situation, that a party seeking to bargain over a nonmandatory subject violates Section 8(a)(5) by persisting in demanding acceptance over the other party's objection. Moreover, Respondent's action here was consistent with the Union's original proposal to cancel a side agreement permitting managers to do cashiering. The removal of the managers from cashiering did not eliminate the function—new employees were hired who were to be unit members. While Respondent hired these people and set up new wage rates for them, the record does not show when that occurred or whether the rates were objectionable. Respondent on resumption of negotiations did offer to bargain over those people, but the Union did not pursue the matter.

Fourth, the industrial truck tests which Respondent resumed administering in January 1979 was a preexisting practice which had been disrupted by the strike. It was not (nor is it so alleged) a reprisal against returning strikers. Indeed, in Anderson's case it appears Respondent wanted to assist him in returning to his forklift job. He had been assigned, as a returning economic striker, to be a tug driver. Respondent's offering him the test together with an implied promise to return him to forklift driving upon his passing was not a detriment to him. When he failed, he was even offered another chance, but refused.

Finally, the question of docking strikers' seniority for the period of time they were on strike is also not of significant merit in this context, although the concept is generally repugnant and is inherently destructive of Section 7 rights. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). Yet, it is not clear that Respondent ever docked anyone's seniority. The only evidence on the subject is Respondent's April 10 prestrike memo[38] and its strike settlement proposal of September 28, refined on October 6, but withdrawn altogether on November 9. Lock did not testify that the proposal had any impact on the course of bargaining during that period—bargaining principally dealth with the back-to-work rights of strikers—and there is no

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[37a] Enf. den. on other grounds, 565 F.2d 1331 (C.A. 5, 1978).

[38] The memo is not alleged to be unlawful.

evidence that any employee actually lost seniority. And, Respondent's continuously adhered to May 17 proposal provided for normal seniority to be retained and used in recall. It appears to me, therefore, that while Respondent flirted with a violation of Section 8(a)(3) and (1) here it has not been proven. Even assuming proof of that violation, the General Counsel is still a step away from proving an 8(a)(5) violation over the proposal itself. The case cited by the General Counsel, *Griffin Pipe Div. of Griffin Wheel Co.*, 136 NLRB 1669, enf. 320 F.2d 656 (C.A. 7, 1963), is similar, but distinguishable. There the employer insisted on inserting the super-seniority provision in question into the contract. No such insistence occurred here, though Respondent did not withdraw the proposal until November 9, after four more negotiation sessions.[39] I am doubtful, therefore that a violation of Section 8(a)(5) has been proven. That is particularly apparent when one observes that bargaining continued thereafter.

One more observation should be made about the September-November bargaining period, though I have alluded to it previously. That is the question of what caused the impasse of November 14. When bargaining resumed in September, the Union's entire thrust related to getting all the strikers back to work at once. It utilized a number of tactics to accomplish this purpose—straightforward proposals, attempting to accept a part of a counterproposal and finally, insisting that the strikers were entitled to be recalled as unfair labor practice strikers. Every other proposal was secondary and Lock and Saunders agree that those problems would have been easily resolved had there been a back-to-work agreement. In that circumstance it is fair to conclude that the failure to reach agreement on the back-to-work issue was the sole reason bargaining broke down and that the other reasons cited by the General Counsel are of no significant weight. Thus they did not contribute to the November 14 impasse in any real way. Moreover, the fact that Respondent would not budge on its back-to-work proposal of May 17 is not necessarily evidence of bad faith. One may not equate a refusal to recede from an announced position advanced in good faith with an unlawful refusal to bargain unless there is a showing

[39] In any event the proposal did not prolong the strike as alleged for the strike ended on October 5, 5 days after the proposal was made.

that the employer was not sincerely trying to reach an agreement. *Div. 1142, Amalgamated Assn. of Street Electric Railway and Motor Coach Employees of America (Continental Bus System, Inc.)*, 294 F.2d 264 at 266 (C.A. D.C., 1961). There has been no showing that Respondent did not desire to reach a contract with the Union. Accordingly, even absent the question concerning representation issue, the decisional rationale followed *supra*, I would find Respondent did not violate the Act as alleged.

Therefore, I find that the evidence presented by the General Counsel in support of the contention that Respondent violated Section 8(a)(5), (3) and (1) of the Act fails to support such a conclusion.

Based on the foregoing findings of fact, and the record as a whole, I hereby make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[40]

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[40] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

IT IS HEREBY ORDERED that the complaint be, and hereby is, dismissed in its entirety.

Dated: December 20, 1979

/s/ James M. Kennedy

James M. Kennedy
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned does hereby certify that three (3) true and correct copies of the foregoing Petition for Certiorari were mailed first-class, postage prepaid, to each of the following this 7th day of May, 1982:

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JUL 8 1982
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CLERK

No 81-2069

In the Supreme Court of the United States

OCTOBER TERM, 1982

ASSOCIATED GROCERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND TRANSPORT AND LOCAL DELIVERY DRIVERS, LOCAL NO. 104

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that an employer's unexpressed intention to hire permanent replacements for economic strikers was insufficient to justify refusal to reinstate the strikers where the replacements understood that they were hired as temporary employees.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A-1 to A-2) is not reported. The Board's decision and order (Pet. App. A-3 to A-79) are reported at 253 N.L.R.B. 31.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981. A petition for rehearing was denied on February 9, 1982. The petition for a writ of certiorari was filed on May 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1978, more than 400 employees in petitioner's warehouse and cash-and-carry retail facilities were represented by respondent Transport and Local Delivery Drivers (Local 104) (Pet. App. A-18 to A-19). On April 12, all but 36 of these employees began an economic strike (Pet. App. A-22). Petitioner immediately began hiring replacements for the striking employees (Pet. App. A-22, A-39).

Petitioner's personnel manager Jay Pickup was responsible for hiring striker replacements. He understood that the replacements were temporary or "casual" employees and not permanent employees (Pet. App. A-41, A-42). Accordingly, he advised them that they were temporary employees. Each of the 1,086 replacements hired during the April 12 to October 4 strike signed a statement saying, "I understand that being employed as a Casual (Jobber) does not guarantee that I will be considered for full-time employment" (Pet. App. A-5 to A-6, A-39).

On May 10, 1978, petitioner's president Billy Joe Nichols sent a letter to all of the warehouse and cash-and-carry employees who were then working stating that they had been hired as permanent employees unless they had indicated that they wished to be considered temporary employees. The letter also stated that the employees would be entitled to company benefits after a 90-day probationary period. At the bottom of the letter was a tear-away coupon that each employee was asked to sign and return acknowledging that he or she had received a copy of the May 10 letter and understood that his or her job was then "considered full-time, permanent employment" (Pet. App. A-5, A-39). Between May 10 and May 18, 237 employees signed that acknowledgement (Pet. App. A-5, A-6, A-39).

Petitioner's president did not inform the personnel manager that strike replacements were to be considered permanent employees. Nor did petitioner's president advise the operations manager William Cooksey (who was later assigned to oversee reinstatement of the strikers) that strike replacements were to be deemed permanent employees (Pet. App. A-5, A-39 to A-40). After the May 10 letter was sent to employees who were then working, petitioner continued to have each new replacement acknowledge his or her temporary status in writing (Pet. App. A-5 to A-6, A-39 to A-40). In late September, while the strike was in progress, both the personnel manager and the operations manager testified at an unemployment compensation hearing before the Arizona Department of Economic Security that the strikers had not been permanently replaced, that the strike replacements had been advised that they were temporary, and that the replacements were carried on the payroll as temporary hires (Pet. App. A-40).

Negotiations continued during the strike. On May 17, petitioner informed the Union that the striking employees had been replaced and that the replacements would remain if petitioner liked their work. Petitioner also proposed procedures for processing applications of strikers who desired reinstatement which, according to petitioner, would have resulted in approximately one-half of the strikers being able to return within 30 days after the contract was ratified.

On October 4, the strikers unconditionally offered to return to work (Pet. App. A-6, A-53). Petitioner refused to terminate any of the replacements to reinstate the strikers (Pet. App. A-6).

2. The Board found that the employees who received and acknowledged petitioner's May 10 letter were permanent employees, but that the 849 replacements hired after May 10, who expressly "acknowledged that their employment

was temporary and received no assurance that their employment was permanent," were temporary replacements subject to termination upon the strikers' offer to return. Accordingly, petitioner violated Section 8(a)(3) and (1) of the Act (29 U.S.C. 158(a)(3) and (1)) "by refusing to reinstate on and after October 4 those economic strikers who had not been permanently replaced" (Pet. App. A-5 to A-6, A-10).[1]

The court of appeals enforced the Board's order (Pet. App. A-2).

ARGUMENT

Economic strikers are "employees" under the Act and are entitled to return to their positions at the conclusion of their strike.[2] An employer who refuses or delays reinstatement of economic strikers violates Section 8(a)(3) and (1) of the Act unless he "can show that his action was due to 'legitimate and substantial business justification[]'." *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

One such "legitimate and substantial business justification" for refusing to reinstate strikers immediately upon their offer to return to work is that "the jobs claimed by the

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[1]The Board held that petitioner also violated Section 8(a)(3) and (1) of the Act by conditioning the reinstatement of striking employees upon their submission to a polygraph examination (Pet. App. A-6 to A-7); in addition, the Board held that petitioner's unilateral establishment of a new position and wage rates for cashiers violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) (Pet. App. A-7 to A-8).

[2]Section 2(3) of the Act (29 U.S.C. 152(3)) defines "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *." See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938).

strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations." *NLRB* v. *Fleetwood Trailer Co., supra,* 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345-346 (1938). The business justification upon which the defense of permanent replacement is based is "the need of the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike." *Laidlaw Corp.* v. *NLRB,* 414 F. 2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). "If an employer hires replacements without a commitment or understanding that the job is permanent * * * the interest in protecting economic strikers by an entitlement to reinstatement is not overcome by a substantial business justification. The employer has not had to offer the jobs on a permanent basis as an inducement to continuing his operations." *NLRB* v. *Mars Sales & Equipment Co.,* 626 F. 2d 567, 573 (7th Cir. 1980). Thus, when an employer asserts the justification of permanent replacement, his burden is to "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis." *Georgia Highway Express, Inc.,* 165 N.L.R.B. 514, 516 (1967), enforced, 403 F. 2d 921 (D.C. Cir.), cert. denied, 393 U.S. 935 (1968). Accord, *NLRB* v. *Mars Sales & Equipment Co., supra,* 626 F. 2d at 573; *NLRB* v. *Murray Products, Inc.,* 584 F. 2d 934, 939 (9th Cir. 1978); *H. & F. Binch Co.* v. *NLRB,* 456 F. 2d 357, 362 (2d Cir. 1972).

Petitioner states (Pet. 6) that "the striker-replacements hired after May 10, 1978 * * * sign[ed] a document acknowledging that they were being hired on a temporary basis" and that "no subsequent letter was ever sent to these employees to inform them that they were being hired as permanent employees." Having thus conceded that the

permanency of the replacements hired after May 10, 1978, existed "only in the mind of * * * [petitioner's] president," petitioner argues that its president's intention to make the replacements permanent employees is sufficient, although that intention was never communicated to the replacements or the officials responsible for hiring replacements and reinstating strikers. Petitioner cites no precedent for this proposition and, we submit, there is none.[3] Contrary to petitioner's argument (Pet. 8), if replacements were hired without any commitment as to permanent employment, there is no legitimate business reason for refusing to permit striking employees to return to work. The fact that the employer could have permanently replaced the striking employees is beside the point. Moreover, the unarticulated intention of an employer is clearly insufficient when each of the replacements states in writing that he was hired as a temporary employee.

There is no merit to petitioner's suggestion (Pet. 8-10) that its asserted good faith belief that the employees hired after May 10, 1978, were permanent replacements is sufficient to preclude findings that it violated Section 8(a)(3) and (1). An unjustified refusal to reinstate striking employees at

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[3]The cases cited by petitioner (Pet. 10-11) provide no support for its position in this case. Indeed, *NLRB* v. *Mars Sales & Equipment Co.*, 626 F. 2d 567, 573 (7th Cir. 1980); *NLRB* v. *Murray Products, Inc.*, 584 F. 2d 934, 939 (9th Cir. 1978); and *H. & F. Binch Co.* v. *NLRB*, 456 F. 2d 357, 361-363 (2d Cir. 1972) (Friendly, J.), make it plain that an uncommunicated "intention" to hire replacements as permanent employees is insufficient to justify refusal to reinstate economic strikers; whether or not a "contract" is required, the replacement must at least be aware that he has been hired as a permanent employee. See *Superior National Bank & Trust Co.*, 246 N.L.R.B. 721 (1979); *Covington Furniture Mfg. Corp.*, 212 N.L.R.B. 214, 220 (1974); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 803-804 (1964). *NLRB* v. *McQuaide, Inc.*, 552 F. 2d 519, 531-532 (3d Cir. 1977), does not address the question, indicating only that whether a striker has been permanently replaced is generally a question of fact.

the conclusion of a strike is sufficiently destructive of important employee rights that proof of antiunion motivation is unnecessary; "the conduct constitutes an unfair labor practice without reference to intent." *NLRB* v. *Fleetwood Trailer Co., supra,* 389 U.S. at 380. Accord, *NLRB* v. *Murray Products, Inc., supra,* 584 F. 2d at 939; *H. & F. Binch Co.* v. *NLRB, supra,* 456 F. 2d at 363 n.5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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